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TABLE OF CASES

857824—49——1

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 25

ELMER W. HENDERSON, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND SOUTHERN RAILWAY COMPANY, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the specially constituted District Court (R. 248) is reported in 80 F. Supp. 32. The reports of the Interstate Commerce Commission involved (R. 4, 184) are reported 269 I. C. C. 73, 258 I. C. C. 413, respectively.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix hereto.

QUESTIONS PRESENTED

The ultimate question is whether or not the order of the Interstate Commerce Commission (R. 11, 12), entered September 5, 1947, dismissing the complaint of appellant Elmer W. Henderson, is valid. This question relates to the report finding (R. 10), upon which the order is based, that "the dining-car regulations established by defendant, effective March 1, 1946, and currently in force, are not shown to be in violation of Section 3, or of any other provision of the act. An order for the future is not necessary."

Subordinate questions relate to the very limited issues presented by the complaint to the Commission, as amended at the first hearing, and as there stated by the Examiner, agreed to by complainant, and by counsel for complainant and defendant railroad. Thus formed issues are limited to alleged violations of the Interstate Commerce Act. The complaint as amended alleges violations of Section 3 of said Act by said defendant in, (1) refusing to serve complainant, (2) by providing unequal, insufficient dining car tables and service, (3) by humiliating, impractical, discriminating, and unfair use of curtained tables, (4) by giving unlawful, discriminatory and unnecessary preference and advantage to certain white persons, and in failure to serve complainant at tables reserved for Negroes where some of those vacant seats were occupied

by white persons. (R. 82.) It was also alleged that defendant violated Section 4 of said Act in failing to provide reasonable facilities for, and to make reasonable rules and regulations with respect to dining car operations.

The Commission found in the first report (R. 19),[1] that "complainant was subjected to undue and unreasonable prejudice and disadvantage" in respect to failure of the railroad to serve him. This finding sustains the complaint allegations (1) and (4), and all other allegations insofar as the incident experienced by the complainant is concerned. The Commission found (R. 194) that no award of damages could be made, which was conceded by counsel for complainant. (R. 90.) There is no further question respecting the incident of May 17, 1942. There remain only questions, stated in the complaint prayer (R. 83), that defendant railroad be ordered to cease and desist from such violations, and in future to establish, apply and enforce for transportation of complainant and other Negro interstate passengers equal and just dining car facilities and such other facilities as the Commission may consider reasonable and just, and that said defendant be required to remove and discontinue the impractical, unequal, humiliating, and discriminating use of curtained tables which are reserved for Negroes.

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[1] 258 I. C. C. 413, 419.

The railroad has already established new rules and regulations for the future (R. 7), which specifically provide "equal but separate accommodations" for white and colored passengers, in its dining car service. The Commission found the amended regulations to be adequate and reasonable provision for equality of service (R. 8) and this was approved by the lower court (R. 256). In practical effect this reduces subordinate questions to two, viz; (1) whether or not the amended dining car regulations adequately and reasonably provide for equality of service and treatment for Negro interstate passengers, and (2) whether or not separation of white and colored passengers, as required by the present regulations is, per se, a discrimination against the colored, a preference of the white, under the Interstate Commerce Act, or constitutes a violation of any provision of such Act.

On this basis the issues presented by this appeal may be stated as follows:

(1) Whether the Southern Railway dining car rule, effective on and since March 1, 1946, constitutes or results in a violation of any provision of the Interstate Commerce Act.

(2) Whether application and enforcement of said rule constitutes or violates any constitutional right of any person, and if so, what, if any, authority or jurisdiction is vested in the Interstate Commerce Commission to hear and decide such a question.

STATEMENT

This is a direct appeal from a final decree (R. 265) of a specially constituted district court, in and for the District of Maryland, dismissing the complaint of appellant (R. 1–12), seeking to set aside an order of the Interstate Commerce Commission (R. 11–12), arising under the following circumstances:

1. Commission proceedings

By complaint filed October 10, 1942 (R. 80–83) against the Southern Railway Company [a corporation, defendant], it was alleged that complainant, a Negro, was a first-class passenger on a southbound train of said defendant railroad, leaving Washington, D. C., at 2:00 o'clock P. M., May 17, 1942, and about 5:25 P. M. he applied for dining car service, at which time the two tables reserved for Negro passengers were occupied by white passengers, with vacant seats in other part of the diner; that the dining car steward advised him to return to his Pullman and wait until notified that he could be served, which he did, but was not so notified; that later complainant twice returned to the diner and each time found white passengers at the tables reserved for Negroes with vacant seats in the other part of car, and upon demand to be served, was refused and offered service in his Pullman, or in the dining car when all white passengers had left the car, or when all seats at the tables reserved

for colored people were vacant; that complainant returned to his Pullman each time without service, and had not been served when the diner was taken off; that defendant's action was unjust, unlawful, disadvantageous, unreasonable, discriminatory, and in violation of the National Transportation Policy (49 U. S. C. Notes preceding sections 1, 300, and 90) in violation of Section 3 (1), of the Interstate Commerce Act, in providing unequal service and insufficient dining tables, by impractical, humiliating, discriminating and unfair use of curtains around reserved tables, and by giving unlawful and discriminatory preference to white passengers; and that defendant violated Section 41, Chapter 2, Title 8, U. S. C., Section 43, Chapter 3, Title 8, U. S. C., Section 4, Title 49, U. S. C., and clauses 1 and 2, Section 2 of Article IV of the United States Constitution. The complaint prayed that, (1) defendant be required to answer the charges, (2) that after hearing defendant be ordered to cease and desist from the alleged violation of the Act, and in future to establish, apply and enforce, for Negro interstate passengers, equal and just dining car facilities, and such other services and facilities as the Commission may consider reasonable and just, (3) that defendant be required to remove and discontinue the use of curtains around tables reserved for Negroes, (4) that reasonable damages, costs, and attorneys' fees be assessed against de-

fendant, and (5) that such other orders be issued as the Commission may deem just.

The Southern Railway Company answered said complaint November 6, 1942 (R. 84), and a hearing was held before a commission Examiner on February 24, 1943 (R. 86), at which complainant and defendant railroad were represented by counsel. At the hearing, paragraphs VI, VII, and IX of the complaint (R. 82–83), were stricken, by agreement of counsel, as not within Commission jurisdiction (R. 88–90), and the complaint prayer for attorneys' fees and costs (R. 83) was stricken by agreement (R. 90), as not provided for under the Interstate Commerce Act. Issues involved in the proceeding were stated by the hearing Examiner, with approval of complainant and his counsel (R. 87), as alleged racial discrimination in refusal of defendant railroad to provide complainant with accommodations equal to those furnished white passengers, in violation of Section 3 of the Interstate Commerce Act, and the Fourteenth Amendment to the Constitution of the United States, guaranteeing equality of rights and protection under the laws, with the prayer that the Commission direct defendant to cease and desist from the alleged unjust and discriminatory practices, and to establish for the future equal and just dining car treatment and facilities for Negro interstate passengers.

There is no conflict in the record evidence that complainant was a passenger on the Southern

Railroad on the date alleged, twice applied for dining service which was both times denied because the two tables reserved for colored passengers were occupied by white passengers, that the dining car was removed from the train about 9:30 P. M. without serving complainant, and that an offer to serve him at his train seat was refused. Also there was no question as to the railroad regulation in force at that time (R. 165–166),[2] or as to the supplemental instructions issued August 6, 1942 (R. 66–67).[3]

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[2] Section 2. Dining Cars: Meals should be served to passengers of different races at separate times. If passen- [fol. 266] gers of one race desire meals served while passengers of a different race are being served in the dining car, such meals will be served in the room or seat occupied by the passenger without extra charge. If the dining car is equipped with curtains so that it can be divided into separate compartments, meals may be served to passengers of different races at the same time in the compartments set aside for them.

[3] "Effective at once please be governed by the following with respect to the race separation curtains in dining cars:

"Before starting each meal pull the curtains to service position and place a "Reserved" card on each of the two tables behind the curtains.

"These tables are not to be used by white passengers until all other seats in the car have been taken. Then if no colored passengers present themselves for meals, the curtain should be pushed back, cards removed and white passengers served at those tables.

[fol. 115] "After the tables are occupied by white passengers, then should colored passengers present themselves they should be advised that they will be served just as soon as those compartments are vacated.

"'Reserved' cards are being supplied you."

There are conflicts respecting certain other evidence. Complainant testified that the diner was not crowded (R. 91) and that the two-seater reserved table had one vacancy, the four-seater reserved table had two vacancies, with vacant seats in the other part of diner (R. 92). The steward testified that the diner was filled before he first saw complainant and remained so until taken off (R. 122), that when first seen complainant was coming around a line of people waiting to enter the crowded diner, and he (the steward) first thought complainant was passing through, but when a seat was vacated he (complainant) started to take it, was stopped and informed that he was not first, that other people had been waiting before he arrived and that better service could be given him in his train seat, which was refused, and after waiting several minutes he left and was not seen for some time. (R. 110–111.) A dining car waiter testified that the car was filled from time service began until they quit serving (R. 138), that at complainant's first visit there was one vacancy at the reserved four-seater table, and the reserved two-seater table was full (R. 143–144), that he saw complainant in the diner twice, at both times the two reserved tables were occupied and a line of people were waiting to be served (R. 141).

Changes in rules and dining car service to meet the needs of vastly increased travel in war emergency, as stated by a Southern Railway of-

ficial, began in 1941 when the former practice of serving the different races at different times was discontinued (R. 166), and use of curtained tables providing separation of races was instituted. Then followed use of reserved card on curtained tables, leaving those tables vacant until remainder of car was full. Then 36-seat diners were increased to 48 seats (R. 167). Instructions of August 6, 1942 (R. 163), provided that the curtained tables were not to be used by white passengers until all other seats in the car had been taken, and if no colored passengers had then applied those tables could be assigned to white passengers, with the further provision that colored passengers later applying should be advised that they would be served as soon as those compartments were vacated. The Southern Railway operates in the southern states of Virginia, North Carolina, South Carolina, Florida, Georgia, Alabama, Mississippi, Louisiana, Tennessee, and Kentucky, and rules for segregation of races were adopted by the railroad to conform to the feeling and attitude of the people in those states, and as a means to preserve peace and order. In the opinion of this witness the seating of colored and white passengers together would create discord and probably end in a race riot (R. 169).

Following the hearing, submission of proposed report and order by Examiner, and exceptions by complainant, a Division report (R. 184) and order (R. 195) were entered May 13, 1944. The

report (R. 185) noted statement in brief of complainant that:

> The specific conduct of which complaint is made and upon which this litigation rests is the defendant's refusal and failure to seat the complainant at a vacant seat at tables allegedly reserved for colored passengers at a time when those tables were partially occupied by white passengers and at a time when the complainant sought service; and the refusal of the defendant to notify the complainant when he could be served, as promised, before the diner was taken off at Greensboro, N. C., with the result that the complainant was never served.

Following a résumé of record evidence, including the supplemental dining-car instructions of August 6, 1942 (R. 185–190, incl.), the report entered its findings of fact (R. 190–191), concluding with the finding:

> It is clear that complainant returned to his seat after his various appearances in the dining car with the distinct impression or understanding conveyed to him by the steward that in a short time space would be available for serving him in the dining car and that he would be notified. The steward could have consummated his understanding [fol. 300] with complainant by not allowing additional white passengers to be seated at the end tables. If that procedure had been followed, an end

table would have been entirely vacated as soon as the white passengers, initially seated there, had completed their meals. As above indicated, complainant stresses the failure to seat him at an end table and to notify him as promised. In our opinion, the circumstances afford sufficient basis for a finding in favor of complainant.

As far as the record is concerned, the occurrence complained of was but a casual incident, brought about by bad judgment of an employee of the defendant who had an overload of work to be done in a limited space and short time. The difficulties encountered were, no doubt, due to a large extent to the overcrowding of the train, resulting from wartime conditions. The record does not disclose that the defendant's general practice, as evidenced by its present instructions, will result in any substantial inequality of treatment as between Negro and other passengers seeking dining-car service.

Based upon these facts the Division found that complainant had been subjected to undue and unreasonable prejudice and disadvantage (R. 191) and that existing instructions appeared adequate for the future, making an order unnecessary (R. 192). In respect to damages claimed, the report found that jurisdiction to award is controlled by Section 8 of the Interstate Commerce Act (R. 192), with right to recover there-

under limited to pecuniary loss (R. 193).* On the basis of such subordinate findings the report found that "no basis for an award of reparation for damages has been shown" (R. 194). In respect to the question of segregation, the report stated (R. 190–191):

> The Interstate Commerce Act neither requires nor prohibits segregation of the races. The regulations of a carrier requiring separation of white and Negro passengers have been held not unlawful when applied to interstate passengers. See *Chiles* v. *Chesapeake & O. Ry. Co.*, 218 U. S. 71, and cases therein cited. Section 3 (1) of the act provides that it shall be unlawful for any common carrier subject thereto to make, give, or cause any undue or unreasonable preference or advantage to any particular person in any respect whatsoever; or to subject any particular person to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. In *Mitchell* v. *United States*, 313 U. S. 80, 97, the Court said that while the supply of particular facilities may be conditioned upon there being a reasonable demand therefor, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. Thus, it is seen that substantial equality of treatment only is required of the carrier.

* Citing *Pennsylvania R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184, 206.

Accordingly an order was entered May 13, 1944, dismissing the complaint, and petition of complainant for further hearing was denied by order of the Commission, dated September 18, 1944 (R. 95).

Thereafter complainant brought action in the United States District Court for the District of Maryland, seeking to annul the Commission order of May 13, 1944, and a statutory three-judge Court in that district, by decree entered February 18, 1946 (R. 79–80) annulled and set aside the said Commission order and remanded the proceedings for further consideration in the light of the Court opinion.[5] The Court opinion (R. 69) noted the concession by plaintiff that denial of damages is not reviewable (R. 68), stated the issues as (1) Is any form of racial segregation of interstate passengers in dining cars a preference, prejudice or discrimination, in and of itself, in violation of the Civil Rights Act, or the Interstate Commerce Act, or both; and (2) even if a certain degree of such segregation be valid, are present rules of defendant railroad respecting dining service nevertheless invalid because they do not provide substantial equality of treatment? The opinion (R. 72–74) reviewed prior authorities respecting the equal rights

[5] *Henderson v. United States*, 63 F. Supp. 906.

clause of the Constitution, Article IV, Section 2,[6] rights under the Fourteenth Amendment,[7] and the power of Congress to legislate specifically, under the Commerce Clause of the Constitution, respecting segregation in interstate travel,[8] and concluded that neither Article IV, Section 2, nor the Fourteenth Amendment provided any prohibition against segregation, that the Supreme Court has repeatedly declared that race segregation by State law is not *per se* an abridgment of any constitutional right, that Congress has constitutional power to legislate as to segregation in interstate travel which has not been exercised, therefore equivalent to a declaration that interstate carriers can separate Negro and white passengers, if substantial equality of treatment is afforded members of both races. The opinion clearly decided (R. 74), "that racial segregation of interstate passengers is not *per se* forbidden by

[6] *Downham* v. *Alexandria Council*, 10 Wall. 173; *Chambers* v. *Baltimore & Ohio R. R. Co.*, 207 U. S. 142; *Chalker* v. *Birmingham & N. W. Ry. Co.*, 249 U. S. 522; *United States* v. *Wheeler*, 254 U. S. 281; *Whitfield* v. *Ohio*, 297 U. S. [fol. 121] 431; *Hague* v. *C. I. O.*, 307 U. S. 496.

[7] *Slaughter House Cases*, 16 Wall. 36; *Plessy* v. *Ferguson*, 163 U. S. 537; *McCabe* v. *Atchison, T. & S. F. Ry.*, 235 U. S. 151; *Missouri ex rel Gaines* v. *Canada*, 305 U. S. 337.

[8] *Hall* v. *DeCuir*, 95 U. S. 485; *Louisville, etc., Railway Co.* v. *Mississippi*, 133 U. S. 587; *Chesapeake & Ohio Ry. Co.* v. *Kentucky*, 179 U. S. 388.

the Constitution, the Interstate Commerce Act, or by any other Act of Congress."

In considering the second question, the Court held (R. 74–78, incl.) it necessary to pass upon the validity of dining car regulations of the Southern Railway then in effect, the supplemental instructions effective August 6, 1942. The Court decided that the Commission erred in holding that these rules will result in no substantial inequality of treatment, for the reason that there was no provision of tables exclusively for Negro passengers, although most of the tables were exclusively reserved for white passengers. For such reasons the Commission order of May 13, 1944, was annulled, set aside, and remanded for further consideration.

Thereafter the Commission reopened the proceeding, in view of the Court decree, and ordered a further hearing which was held on October 15, 1946. At the beginning of the hearing counsel for complainant announced that he would offer no testimony, stating his opinion that there was no question, under the Court decree, as to facts, and that the only matter for consideration was the law and new or certainly different regulations (R. 197). Defendant then offered its testimony.

The Assistant Vice-President in charge of Transportation operations offered the Circular effective March 1, 1946, respecting segregation of white and colored passengers in dining cars (R. 223):

Consistent with experience in respect to the ratio between the number of white and colored passengers who ordinarily apply for service in available diner space, equal but separate accommodations shall be provided for white and colored passengers by partitioning diners and the allotment of space, in accordance with the rules, as follows:

(1) That one of the two tables at Station No. 1 located to the left side of the aisle facing the buffet, seating four persons, shall be reserved exclusively for colored pasengers, and the other tables in the diner shall be reserved exclusively for white passengers.

(2) Before starting each meal, draw the partition curtain separating the table in Station No. 1, described above, from the table on that side of the aisle in Station No. 2, the curtain to remain so drawn for the duration of the meal.

(3) A "Reserved" card shall be kept in place on the left-hand table in Station No. 1, described above, at all times during the meal except when such table is occupied as provided in these rules.

The witness testified that the rules were changed to conform with the court opinion in *Henderson* v. U. S., *supra*. Also identified and offered were a series of photographs (R. 224, A, B, C, and D) of a permanent partition arrangement in one car, showing how the table exclusively assigned colored patrons is placed in relation to other tables and dining car facilities. The witness described the

permanent partition car in detail and stated that the railroad planned to equip all diners in the same way as soon as the cars were sent to the shops for repairs (R. 201), and expressed the opinion that under the amended instructions, including the permanent partition arrangements, equal facilities would be furnished both races.

The Superintendent of Dining Cars testified that he had conducted a test check of the number of white and colored passengers using dining service on the Southern Railway between Atlanta and Washington (R. 215) the test made upon his instruction and supervision, the check being made by each steward and turned in at end of his trip, the records offered in the Court being compiled from such reports, in witness's office (R. 218). The first check covered the period May 14 to 24, 1945, and the compilation is Exhibit 8 (R. 225–236, incl.), which shows the totals of dining cars, trains, kind of meals, total meals served, and number of colored passengers served for each meal, each diner, and each train, separately for each day and total for the test period. A similar test check was made for the period October 1 to 10, 1946, with reports and compilations in the same manner, offered as Exhibit 9 (R. 237–247, incl.). Total meals served during the 1945 check (R. 225) were 37,615, of which 36,463 were to white passengers, and to colored passengers 706 military and 446 civilian. The colored patrons, military and civilian, represented

3.06 percent of all meals served, of which 1.19 percent were civilian.[9] The same totals for the 1946 test period (R. 237) show total meals 20,789, with 19,917 to white, and 872 to colored, civilian 723, military 149, and in percentages 3.48 percent civilian colored and 95.80 percent white. Under current rule tables are assigned exclusively to white and to colored passengers, in ratio of ten to one, respectively (R. 211), which, in the opinion of Vice-President McClain (R. 207) adequately accommodates dining car patrons at the present time, and from experience will be sufficient for the future.

Following submission of the Examiner's proposed report, the filing of exceptions thereto, and submission of oral argument, the Commission entered its report on further hearing, September 5, 1947 (R. 4–11, incl.).[9] The report noted the Court holdings in the prior action, *Henderson v. United States, supra,*[10] to the effect that defendant's dining car regulations then in effect did not provide equality of treatment, required by Section 3 (1) of the Interstate Commerce Act, and were not adequate for the future (R. 5); that racial segregation of interstate passengers is not *per se* forbidden by the Constitution or by any Act of Congress, and that failure of Congress to exercise its power under the commerce clause of the Constitution to legislate with respect to

[9] 269 I. C. C. 73.

[10] 63 F. Supp. 906.

race segregation, is equivalent to a declaration that interstate carriers may separate white and Negro passengers, provided equality of treatment is accorded both races traveling under the same conditions (R. 6); and that the real question involved is not segregation but one of equality of treatment, not involving State segregation laws as neither the defendant railway nor the Commission relied upon those laws.

The report quotes the new dining car regulations, effective March 1, 1946, reviews the plan there established, and approved the results in the following statement (R. 8):

> The current regulations were designed by the defendant to meet the court's criticisms of those, set forth at page 415 of the prior report, which they superseded. By the new rules, defendant has abolished its former practice, condemned by the court, of permitting white patrons to be [fol. 11] seated at the tables conditionally reserved for colored passengers when all other tables had been occupied, and of refusing to permit a Negro, who applied for service after the tables so reserved for members of his race had been fully or partially occupied by white patrons, to take any vacant seat in the car. Its rules now provide for the absolute reservation of space for the use of Negro passengers exclusively. Under no circumstances are white passengers served in such space; nor are colored passengers served elsewhere

> in the car. In these respects defendant's present practice appears to conform with the opinion of the court.

In respect to adequacy of the space assigned colored passengers the Commission found as follows (R. 9):

> As stated, the ratio of the number of meals served Negro civilians to the total number served all patrons increased from 1.19 percent during the May 1945 test period to 3.48 percent during the October 1946 period. Should the indicated trend continue, substantial equality of treatment may require the reservation of additional accommodations for Negroes in the future. On the record before us, however, the conclusion is inescapable that defendant's rules now provide an equitable and reasonable division between the races of its available dining-car space.

The report further overruled the contention of plaintiff that use of curtains results in preference and prejudice, and subjects Negroes to humiliation and embarrassment not experienced by white passengers, in the following statement (R. 9–10):

> With respect to the contention of complainant that the use by defendant of curtains or partitions, as described, violates the rule of substantially equal treatment, and results in undue preference and prejudice, in that Negroes are subjected to humiliation and embarrassment not ex-

> perienced by white passengers, the statutory court stated that the method of carrying into effect the principle of segregation approved by the Supreme Court is for us to determine. In ***Mays*** v. ***Southern Ry. Co.***, 268 I. C. C. 352, decided April 8, 1947, after concluding that the evidence did not justify a finding that equality of treatment can result only from the discontinuance of segregation in dining cars, we found that the dining-car regulations under consideration herein were not shown to be in violation of section 3 or of any other provision of the act we administer. The record in the instant proceeding does not warrant a different conclusion; nor does it afford sufficient justification for condemning the methods by which defendant separates the tables reserved for white and colored patrons.

The report also overruled the contention of complainant that defendant's current regulations constitute a burden on interstate commerce, in the following statement (R. 10):

> [fol. 12] In support of his position that defendant's current regulations constitute an undue burden on interstate commerce, the complainant relies upon the recent decisions of the Supreme Court in *Morgan* v. *Virginia*, 328 U. S. 373, and of the United States Court of Appeals for the District of Columbia in *Matthews* v. *Southern Ry. System*, 157 Fed. (2d) 609, wherein statutes of the State of Virginia requiring the sep-

aration of white and colored passengers on interstate motorbuses and railroad coaches were held unconstitutional and invalid. The cited cases are readily distinguishable from the instant proceeding. They involve the power of a State to regulate interstate commerce, whereas the issue here concerns regulations of an interstate carrier. As stated previously herein, the statutory court in *Henderson v. United States, supra,* pointed out that it was not necessary to approach the case from the aspect of State segregation laws, and concluded that the inaction of Congress respecting segregation means that interstate carriers may separate white and colored passengers if substantial equality of treatment is accorded both races when traveling under like conditions. Defendant's dining-car regulations apply only to service in dining cars, which cars are not permitted to leave its lines. They apply uniformly over defendant's entire railroad system, embracing approximately 8,000 miles of lines extending into all southeastern States. Their enforcement cannot in any circumstances result in disturbance to passengers by forcing them to change seats upon crossing State lines, a requirement of the Virginia statutes which the courts condemned as imposing an undue burden on interstate commerce. We think it evident that the cases to which the complainant refers are not determinative of the issues herein.

The ultimate finding affirms that of the prior report that complainant was subjected to prejudice and disadvantage upon the occasion involved and adds, "We further find that the dining-car regulations established by defendant effective March 1, 1946, and currently in force, are not shown to be in violation of Section 3, or any other provision of the Act. An order for the future is not necessary" (R. 10). Accordingly an order was entered the same date dismissing the complaint (R. 11–12).

2. Proceedings in the District Court

Complaint herein, seeking to set aside and enjoin the Commission order of September 5, 1947, was filed November 18, 1947. Alleged errors were: paragraph 7 (R. 2), that the railroad violated Section 1 (4) of the Act, in that it failed to provide reasonable facilities and to make reasonable rules and regulations with respect to operation of through routes; paragraph 8 (R. 3), that the railroad violated Section 3 (1) of the Act in that it practiced undue and unreasonable preference and disadvantage against plaintiff and subjected him to unlawful and humiliating use of a curtained table allegedly reserved for colored passengers, and by giving unlawful, discriminatory and unnecessary preference to white passengers, in seating them in the diner and refusing him service solely on account of his color; paragraph 9 (R. 3), that enforcement by the railroad of its

alleged regulation and any regulation requiring separation of passengers according to race or color is unreasonable, unlawful and violative of his constitutional rights as a passenger traveling in interstate commerce, and that the railroad has no authority to issue or enforce any such regulation, nor is it within the power of the Interstate Commerce Commission so to approve; and paragraph 10 (R. 3), that the Commission order of September 5, 1947, is without rational basis, was issued in error, and if allowed to become effective will result in irreparable harm to plaintiff and deprive him of his liberty without due process of law, all in violation of his constitutional rights. The complaint prayer (R. 3) is that the Court find the refusal of the Commission to issue a cease and desist order against the alleged violation is erroneous and in contravention of the rights of plaintiff; that the Court enter a preliminary injunction restraining enforcement of the Commission order dismissing the petition of plaintiff, that upon final hearing the said order be set aside, and for such other relief as the Court may deem just and proper.

The United States and the Interstate Commerce Commission were each named defendants in said complaint (R. 4), and the Southern Railway Company intervened with court approval. The United States, by and through its Assistant Attorney General and United States Attorney filed answer on December 24, 1947 (R. 12–13),

in which it was alleged that the Commission order of September 5, 1947, "was duly made upon substantial evidence, and in accordance with applicable law and was and is in all respects valid and lawful." The Commission filed its answer February 5, 1948 (R. 13–16, incl.), in which it was alleged the order of September 5, 1947, was and is valid and lawful, that the report findings and conclusions were entered after a full and fair hearing, and were and are fully supported and justified by the evidence, and that the report and order did not exceed the authority conferred upon it by law. Intervenor Southern Railway Company filed its answer on June 4, 1948 (R. 16–17), adopting the Commission answer.

A final hearing was held by the Court on June 4, 1948 (R. 17–53, incl.), and the action submitted upon the record offered (R. 53–63, incl.), under pleadings, briefs, and oral argument of counsel for plaintiff-appellant (R. 18–26, incl.), for defendant the United States by a Special Assistant to the Attorney General (R. 26–29, incl.), for defendant the Interstate Commerce Commission (R. 30–35, incl.), and for intervenor the Southern Railway (R. 35–47, incl.). Opinion of the court (R. 248–265, incl.)[11] was filed September 25, 1948, decree dismissing complaint (R. 265) was filed October 28, 1948, and petition for appeal (R. 266), assignment of errors (R. 266–269, incl.), and order al-

[11] 80 F. Supp. 32.

lowing appeal (R. 269) were filed November 17, 1948.

The court opinion reviewed the record of the Commission proceeding, including the amended dining-car rule, and the prior court action and opinion, and upon the basis of record checks of passengers (R. 254) held that "the conclusion is inescapable, that defendant's rules now provide an equitable and reasonable division between the races of its available dining-car space" (R. 255). In respect to the amended dining-car rules, the opinion held (256–257):

> We are satisfied, without further quoting from or analyzing the report of the Commission, that the inequality which we found to exist in the Railway Company's earlier dining car regulations, as respects the facilities afforded white and Negro passengers, has been removed by the Railway's amended regulations. We also believe there is no sound basis for treating the matter of fixed partitions between the tables differently from our treatment of the use of curtains. The same applies also to the location of the table allotted to colored passengers. We do not find that the Commission [fol. 387] has permitted the Railroad to create an unjust discrimination by allotting to such passengers a table at the kitchen end of the dining car, directly opposite the space newly provided for the stewards office. The undesirability of this location compared with that of tables in

> other parts of the dining car, from the point of view of noise, heat, etc., as alleged by plaintiff, is, we think, non-existent. Therefore, it necessarily follows that this present complaint must be dismissed unless the Supreme Court has, in some decision or decisions rendered since the date of our earlier decision, extended the principles which it had previously announced with respect to the matter of equality of treatment of the races when engaged in interstate transportation.

The opinion considered *Morgan* v. *Virginia,* 328 U. S. 373, and *Bob-Lo Excursion Co.* v. *Michigan,* 333 U. S. 28 (R. 257), and held that the Morgan case required no change in the prior court decision herein, that "the real question before us is not one of segregation, but equality of treatment", and further said (R. 258):

> That the Supreme Court in the *Morgan* case very definitely recognized the distinction between the two types of cases, namely those involving the validity of a State statute [fol. 389] and those involving the rule of a carrier requiring segregation of interstate passengers, is indicated by the following footnote on page 377 of its opinion: "When passing upon the rule of a carrier that required segregation of an interstate passenger, this Court said, 'And we must keep in mind that we are not dealing with the law of a State attempting a regulation of interstate commerce beyond its power to make.' *Chiles* vs. *Chesapeake*

& Ohio R. R. Co., 218 U. S. 71, 75." See also *Simmons* vs. *Atlantic Greyhound Corporation*, 75 F. Supp. 166; *Stamps* vs. *Louisville & Nashville Railroad Co.*, I. C. C. [269 I. C. C. 789].

"The Commission in its report now under review, clearly stated, we think the distinction between the two types of cases in the following language (269 I. C. C. 73 at [77]: "Defendant's dining car regulations apply only to service in dining cars which cars are not permitted to leave its lines. They apply uniformly over defendant's entire railroad system, embracing approximately 8,000 miles of lines extending into all southeastern States. Their enforcement cannot in any circumstances result in disturbance to passengers by forcing them to change seats upon crossing State lines, a requirement of the Virginia statutes which the courts condemn as imposing an undue burden on interstate commerce."

In respect to the *Bob-Lo* case, the opinion (R. 259) in distinguishing that case from the *Morgan* case and from *Hall* v. *DeCuir*, 95 U. S. 485, quoted from the Bob-Lo opinion, at pages 39-40 as follows (R. 259):

The regulation of traffic along the Mississippi River, such as the Hall case comprehended, and of interstate motor carriage of passengers by common carriers like that in the Morgan case, are not factually comparable to this regulation of appellant's

highly localized business, and those decisions are not relevant here.

The opinion further held that the deed covenant decisions in *Shelley* v. *Kraemer*, *Hurd* v. *Hodge*, *McGhee* v. *Sipes*, and *Uricolo* v. *Hodge*,[12] "obviously have no relation, directly or indirectly, to the issue in the present case. Those decisions do not hold that race segregation in respect to deed covenants is forbidden" (R. 259). The opinion disagreed with *Matthews* v. *Southern Railway Company*, 157 F. 2d 609, 610, where the only issue was correctness of the trial judge's charge to the jury in a race segregation case, and a footnote reference to the *Morgan* case said it could see "no valid distinction between segregation in buses and in railroad cars," and held "there is a very definite distinction from the aspect of dining car accommodations during railroad transportation" (R. 260).

The conclusion of the opinion was as follows (R. 260):

> To summarize and conclude: (1) Racial segregation of interstate passengers is not forbidden by any provision of the Federal Constitution, the Interstate Commerce Act or [fol. 391] any other Act of Congress as long as there is no real inequality of treatment of those of different races. (2) Allotment of seats in interstate dining cars does not per se spell such inequality as

[12] 334 U. S. 1, and 334 U. S. 24.

long as such allotment, accompanied by equality of meal service is made and is kept proportionately fair. This necessity was recognized by the Commission in its report on which the order now approved by us is based, when it said (269 I. C. C. 73 at [76]): "Should the indicated trend continue, substantial equality of treatment may require the reservation of additional accommodations for Negroes in the future." To the argument that proportionate allotments of tables is only just and equitable so long as persons may find seats at a table assigned to their respective races, and fails to meet the equality test when there is *any* empty seat in the dining car which a person of either race is forbidden to occupy, suffice it to say that this argument denies the very premise from which we start, namely, that racial segregation is not, per se, unconstitutional. Since this is true, we fail to see that a situation such as that just referred to produces a result any more unjust or inequitable from a legal approach—which must be this Court's approach to the question—than the no doubt common situation where both white and colored passengers may be kept waiting to secure seats at tables allotted to their respective races, because, for the time being, *every* seat in the dining car may be occupied.

Circuit Judge Soper entered a dissenting opinion (R. 261–265, incl.), agreeing with the

majority except for approval of the amended dining car rule. In respect to that rule the dissenting opinion held (R. 261) that inequality would result if and when more than four colored passengers applied for dining service at the same time, since the reserved table had only four seats. The basis of this opinion is that the railroad must provide sufficient table space for any number of colored passengers, even though no advance knowledge of that number could be possible. This opinion said, "Segregation in railroad traffic may be maintained if there are sufficient accommodations for all;" (R. 261). This seems to say that dining space must be provided for all colored people, although the same rule would not apply to white passengers, and despite the record evidence showing that white percentage greatly exceeded colored, practically every meal according to the two ten-day checks made in 1945 and 1946 (R. 225–236, incl., and 237–247, incl.). A rule based upon this principle assumes that during the dining period of some four hours, if there were 8, 10, or 12 colored diners, all of them would demand service at the same moment. There is no record evidence of any such abnormal and planned demand or complaint of failure to receive service under the amended rules. The check records do show that for the 639 serving periods during these tests there were no colored diners 93 times and no more than four for 119 times, or full seating

capacity for all colored diners 212 times out of 639. At some 57 serving periods during the tests there were more than four times as many white diners as there were available tables for them. If it is correct to assume facts to sustain this reasoning, then the railroad would be required to operate four diners instead of one, upon the theory that every white diner would demand service at the same moment. It is common knowledge that all people do not eat at the same moment, and surely in this respect colored and whites may be expected to observe similar hours for their meals. According to the test records the greatest number of colored diners could have been served in some two hours of the four in which diners are open. That is more advantageous for colored than for whites, a preference rather than a discrimination. At any rate, as the court opinion noted (R. 260), the Commission found that the railroad, under the amended rule, could be expected to provide for increased colored diners when that occurred. That is in effect an order to the railroad not to prefer white over colored in assignment of space, which is also prohibited by the rule provision that there shall be equality of service.

SUMMARY OF ARGUMENT

The Interstate Commerce Act

There is no question as to Commission duty and authority under the Interstate Commerce

Act, to remove and prohibit any and all prejudice, preference discrimination, and disadvantage, prohibited by that Act. Likewise it is a duty and responsibility, in applying legislative regulations of interstate carriers, to require those carriers to make reasonable charges for services, to provide reasonable equipment and services, and to establish fair and just relationship among such carriers, and between them and the public served. This duty and authority is illustrated by the Commission action in this proceeding. Section 3 (1) of that Act makes it unlawful for any railroad to give, make or cause any undue or unreasonable preference or advantage to any person, in any respect whatsoever, or to subject any person to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

The Commission has held, and the District Court has approved, that appellant was subjected to undue and unreasonable prejudice and disadvantage, by the Southern Railway Company, on May 17, 1942, in the failure of the dining car steward to serve said appellant as he demanded, and as was provided for under existing rules. This was found despite the Commission conclusion that the occurrence was but a casual incident, brought about by bad judgment of an employee, overloaded with work to be performed in limited space and time, due to overcrowded train because of war-time conditions. The Commission held that an award of damages is authorized

under Section 8 of the Act, but limited to pecuniary loss suffered and proved. There being no pecuniary loss suffered by appellant, no award could be made, and this was conceded by appellant, and approved by the lower court. Having found the discrimination and prejudice claimed because of this incident, no further question concerning that claim remains.

There did remain the question as to whether or not existing practices and rules were adequate to reasonably prohibit such prejudice and disadvantage for the future. The Commission found the amended rules effective August 6, 1942, adopted after the occurrence here complained of, adequate for the future. Those rules (R. 186–187) provided for two curtained tables, reserved for colored diners, not to be used by whites until all other seats were occupied, and then only if no colored had applied for service, and if passengers later applied they should be advised that they would be served as soon as those tables were vacated. In the first court action these rules and the Commission approval thereof were held unlawful, solely upon the ground that no tables were exculsively assigned to colored passengers although all others were exclusively assigned to the whites. The Southern Railroad and the Commission both recognized the correctness of that Court decision, and upon rehearing further amended railroad rules, effective March 1, 1946, (R. 7–8) providing for "equal but

separate" accommodations and exclusive use of one table for colored patrons. The Commission held the amended rules adequate for the future, as providing an equitable and reasonable division between the races of its available space, and if colored diners increased, substantial equality may require reservation of additional space in the future. The District Court approved the amended rules and the Commission findings in respect thereto, as providing reasonably equal treatment for colored passengers.

Appellant complained to the Commission (R. 81–83), and to the court (R. 55–56), and alleged violations of the National Transportation Policy, of Sections 1 (4) and 3 (1) of the Interstate Commerce Act (R. 2–3). These allegations are further stated in appellant's assignment of error (R. 266–268) and again in appellant's brief, page 5, where questions presented by this appeal are set forth. The Commission based its order upon recognizable provisions of the Interstate Commerce Act, holding first that appellant had been subjected to undue prejudice and disadvantage, on the basis of inequality of treatment, in violation of specific provisions of the Act, and second that the railroad dining car rules provided equality of treatment for the future, as required by the Act. Appellant's contention, although not clearly presented as such, that segregation in and of itself violates the Act, was rejected by the Commission, in the first report (R. 190) upon the ground that

"The Interstate Commerce Act neither requires nor prohibits segregation of races", under authority of Supreme Court decisions (R. 191) [12] and by the second report (R. 4) which affirmed the findings of the first report in that respect, and additionally found that the amended dining car rules, effective March 1, 1946, do not constitute a burden upon interstate commerce, under authority of the prior District Court opinion herein, and of *Morgan* v. *Virginia*, 328 U. S. 373, and *Matthews* v. *Southern Ry. System*, 157 Fed. 2d 609.

The first District Court opinion herein (R. 63) found the then existing railroad rule a violation of the Act in not providing equality of treatment, since tables were assigned exclusively to whites but not to colored passengers, and further held that racial segregation is not per se forbidden by the Constitution, the Interstate Commerce Act, or any other Act of Congress, and that inaction of Congress is equivalent to a declaration that segregation may be provided in interstate travel if substantial equality is afforded both races, under authority of cited Supreme Court decisions (R. 72–73). In the second District Court opinion (R. 248), the amended dining car rules, effective March 1, 1946, and the Commission finding thereon were approved, as being adequate future protection for equality of treatment.

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[12] *Chiles* v. *Chesapeake & O. Ry. Co.*, 218 U. S. 71; *Mitchell* v. *U. S.*, 313 U. S. 80.

Although appellant vaguely contends that the treatment accorded colored passengers in assignment of diner space is unequal, on the basis of quality, it seems quite clear that the only serious claim of unequal treatment is in the separation of the races. That is the stated question in appellant's brief, and inequality of treatment otherwise is only vaguely implied. This contention is that any and all segregation of races in interstate travel by carrier regulation or otherwise is a violation of the Interstate Commerce Act, and necessarily invalidates the carrier dining car rules herein. The Commission would concede that any carrier practice, rule, or regulation which does not provide substantial treatment, or which violates any provision of the Interstate Commerce Act, is unlawful and requires Commission action in a proper proceeding to invalidate.

Appellant contends that application and enforcement of the amended dining-car rule would constitute a burden upon interstate commerce, such as was found by this Court in *Morgan* v. *Virginia, supra.* That adds a question as to possible violation of the Interstate Commerce Act. The second report of September 5, 1947, fully considers this question and clearly distinguishes the carrier rule and the facts here involved (R. 10), from the State statute and the facts involved in the *Morgan* case opinon, also from the legal and factual situation in *Matthews*

v. *Southern Ry. System, supra.*[14] The opinion of the District Court below (R. 248–258) also carefully considered the question of alleged burden upon interstate commerce, resulting from the amended dining-car rule herein, clearly distinguished the situation herein from that in the *Morgan, Matthews,* and several other recent Supreme Court decisions involving race segregation, and concluded that the rule constituted no burden upon interstate commerce. Facts and law of the case seem to warrant these holdings of the Commission and the lower courts.

The Constitution and separation of races in interstate commerce

This appeal poses the question as to whether or not race segregation per se in interstate travel, under carrier rules, is forbidden by the Constitution, and if so, what authority or jurisdiction is vested in the Commission to decide such a question. Appellant contends the Commission and the District Court below approved segregation; however, that misconceives the purpose, responsibility, and result of what was done. It was only decided that segregation is not forbidden by statute or Constitution, as interpreted by judicial authority. The Commission definitely considered such segregation as beyond its authority to approve or disapprove, and as one exclusively for determination of Congress.

[14] See also *Mays* v. *Southern Ry. Co.*, 268 I. C. C. 352.

Argument upon the constitutional question is submitted only to more fully state the Commission conception, and to refute the ardent contention of appellant that it was the duty and responsibility of the Commission, to declare invalid the railroad dining car rule upon that ground. There can be no question of the constitutional power of Congress, under the Commerce Clause, to regulate racial segregation in interstate commerce. Congress has repeatedly refused to legislate upon that subject, over a period of many years.[15] The question of racial segregation, as a violation of rights guaranteed by the Constitution, has been urged upon courts for many years, practically since the adoption of Amendments following emancipation of slaves, to safeguard their freedoms and rights, not only with respect to interstate commerce but with respect to almost every human relationship.[16] Insofar as here known no court has decided that segregation, per se, is forbidden by the Constitution. The lower court opinion held, in overruling the constitu-

[15] H. R. 8821, 75th Congress, 3rd Session, January 5, 1938; H. R. 182, 76th Congress, 1st Session, January 3, 1939; H. R. 1925, 79th Congress, 1st Session, February 1, 1945; H. R. 22, 81st Congress, 1st Session, January 3, 1949; and H. R. 831, 81st Congress, 1st Session, January 5, 1949, to cite only a partial list of bills introduced in the past 25 years.

[16] *Hall* v. *DeCuir*, 95 U. S. 485; *Civil Rights Case*, 109 U. S. 3; *Plessy* v. *Ferguson*, 163 U. S. 537; *Chiles* v. *Chesapeake & O. Ry. Co.*, 218 U. S. 71; *Morgan* v. *Virginia*, 328 U. S. 373; *Missouri Ex Rel. Gaines* v. *Canada*, 305 U. S. 337; *Mitchell* v. *U. S.*, 313 U. S. 80; *Shelley* v. *Kraemer*, 334 U. S. 1.

tional contention herein, "It therefore being clear that racial segregation of interstate passengers is not per se forbidden by the Constitution, the Interstate Commerce Act, or any other Act of Congress."

Appellant's brief, p. 72, states, "This Court has never ruled that segregation of passengers is permitted under the Interstate Commerce Act." That is perhaps because the Act, as stated by the Commission "neither requires nor prohibits segregation". That brief, page 55, also states, "The Commission and the Court below were of the opinion that segregation based on race abridges no rights protected by the Constitution or the Interstate Commerce Act." The Commission expressed no such opinion as to any constitutional right. Appellant also contends, brief page 74, that the Commission order herein is contrary to public policy of the United States, and, page 78, that segregation is contrary to the philosophy of our Government. This clearly contends that the Commission order is unlawful, not only as a matter of law, but also as a matter of governmental policy and philosophy, which is not a part of the Constitution or enacted statutes. Apparently appellant is unwilling to have his case decided according to existing law and judicial authority, for he says, brief pages 87–88, "what we seek is not justice under law as it is. What we seek is justice to which law in its making should conform." Appellant

really contends that the Commission erred in applying the law as it now exists, and in refusing to substitute therefor what appellant claims is justice. The lower court erred, according to appellant, in applying law as it is and not as appellant wishes it to be. In the face of repeated refusal of Congress to prohibit segregation, and repeated refusal of courts to hold that segregation is prohibited under existing law, it would have been a brazen and unwarranted usurpation of power by this administrative arm of government, to have attempted prohibition of segregation, as herein contended by appellant. The lower Court felt constrained to follow existing law and superior judicial authority, as that was understood, rather than to ignore law and decide according to the wishes of appellant.

The present law upon the subject of segregation can be changed under constitutional provisions and judicial precepts, only by Congress. The Commission has no authority to amend the present law, and its authority is derived from Congress, which has refused to change this law. This court has often held that Commission action beyond the scope of its statutory authority is unlawful.[17] Neither the Commission nor the courts have the power to legislate, or to amend the Constitution as here insisted upon by appellant.

[17] *Rochester Telephone Corp.* v. *U. S.*, 307 U. S. 125.

Were the question here not related to the controversial subject of race relations it would undoubtedly be immediately conceded that the Commission has no authority to decide upon segregation under the Constitution. That does not relate alone to interstate commerce, but to all other spheres of life, schools, playgrounds, meeting places, business, and homes.

It is the position of the Commission that, (a) race segregation in interstate travel is not forbidden by the Constitution, and (b) that prohibition of segregation by the present Constitution is possible only by interpretation, not heretofore held or stated by court authority or Congress, and is not within the jurisdiction or authority of the Commission to make.

ARGUMENT

I

The Southern Railway Dining Car Regulations, effective March 1, 1946, do not constitute or result in a violation of any provision of the Interstate Commerce Act

(a) The amended dining car rule reasonably provides substantial equality of treatment for colored passengers

It is here conceded that any rule, regulation, or practice of a railroad which does not provide equal treatment for all persons, would violate Section 3 (1) of the Interstate Commerce Act, and would be unlawful. That section makes it unlawful for any such carrier "to make, give, or cause any undue or unreasonable preference or advantage to any particular person, * * * or to subject any

particular person, * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; * * *." This includes dining car service and prohibits any and all substantial or material difference in charge, service, facilities, and food, in preference or advantage to any particular person, or to the prejudice or disadvantage of any particular person. This provision applies to all persons alike, without reference to race, color, or any other difference or characteristic as between particular persons.

It is doubted that appellant seriously contends the dining car service of the Southern Railway, to white and colored passengers under its amended rules, effective March 1, 1946, is other than substantially equal. The somewhat vague contentions in that respect relate to inconsequential details, normally the exclusive Commission function to decide upon the record facts, or appear to be tenuous argumentative support for the real contentions with reference to separation of races. The complaint to the Commission was based upon an incident occurring to appellant during war time when trains were badly overcrowded. The railroad dining car rules and practice have since that time been twice amended to meet the Commission and Court requirements that equality of service shall be rendered in future. The Commission found in that incident that appellant was subjected to prejudice and disadvantage, in violation of Section 3 (1) of the Act. Clearly that dis-

posed of the incident and leaves only the question as to whether or not the amended rules reasonably provide for substantial equality of treatment for the future.

Appellant's complaint to the Commission (R. 83) asked that defendant-railroad be ordered to cease and desist from the alleged prejudice and disadvantage of that incident, and to establish for the future equal and just dining car facilities for complainant and other Negro interstate passengers. The finding of prejudice in the incident satisfied the relief asked in that respect, and the amended rules are intended by the railroad, so held by the Commission and the lower court, to provide equal treatment for the future. Except for the question of lawfulness in separate racial service, as *per se* constituting a prejudice or inequality of treatment, the amended rule itself provides that "equal but separate accommodations *shall be provided for white and colored passengers* by partitioning diners and the allotment of space, in accordance with the rules." [Italics supplied.] If the separate service is reasonable and lawful, in providing equal treatment, as the Commission and Court have found, then no inequality would be possible except for violation of the rule, as applied by employees, such occurrences cannot be foreseen and no reasonable assumption can be indulged that rule violation by employees will occur. If there should be such unforeseeable incident relief may

be had in courts with proper jurisdiction, where such matters may be lawfully decided.

At the first Commission hearing, February 24, 1943 (R. 87–90) issues were practically agreed upon by the Examiner and counsel for all parties, in effect that discrimination against complainant was caused by refusal to serve him as alleged, in violation of Section 3 of the Interstate Commerce Act and of the Constitution guarantee of equality of rights. It was there stated and agreed that the relief asked of the Commission was an order to cease alleged unjust discriminations, and to establish for the future *equal and just dining car treatment* for complainant and other Negro interstate passengers. Appellant's complaint in the first court action alleged violations of the Interstate Commerce Act by defendant, particularly the National Transportation Policy (R. 55) and Section 3 (1) (R. 56), by reason of alleged discrimination and prejudice, and by providing *"unequal, insufficient tables and dining car service."* [Italics supplied.] Complaint in the District Court, here involved (R. 3), alleges violation of Section 1 (4) and Section 3 (1) of the Act, appears to relate only to the contention that segregation is, in and of itself, the violation claimed. This complaint seems to have abandoned the vague prior contention that, under the amended dining car rules, equal treatment is not afforded colored passengers. Appellant's brief, page 5, states the question pre-

sented by this appeal, and therein no violation of the Interstate Commerce Act is alleged, based upon unequal treatment or service. On the contrary every question stated is based upon segregation as the only basis for alleged violation of the Act and the Constitution. Scant attention is given in the brief argument to the question of unequal treatment, and that based upon insignificant details, due, as was said in *Plessy* v. *Ferguson, supra,* page 551, "not by anything found in the Act, but solely because the colored race choose to put that construction upon it."

To support the charge that colored passengers are not given equal treatment, appellant's brief states, pages 26–27, practically without reference to the record evidence, that only Negro passengers are confined to service at one table, behind a wooden partition, roped off like a stall until occupied, limited to serving only four at one time although all other diner seats may be vacant, required to sit at one table next to the kitchen with its clatter and traffic, and opposite the steward's office where waiters gather for supervision and change making at the cash register. These charges are almost the only factual basis for unequal treatment.

The record of evidence does not sustain these charges or permit the conclusions drawn by appellant, as to unequal treatment. The only evidence respecting the quality and kind of accommodations provided under the amended

rules, was submitted by the Southern Railroad at the second Commission hearing, October 15, 1946 (R. 197). Two officials testified, one (R. 198–215, incl.) as to the amended rule, the arrangement of dining cars, the plan for serving, describing the entire setup with pictures of the wooden partition in one car, which is planned to be installed in diners as they go to shops for repair (R. 224 A, B, C, D). The other official testified to the number of passengers served meals on all diners operating between Washington and Atlanta, during two ten-day test periods, one in 1945 and one in 1946, and submitted tabulations of the results showing the total meals served, the number each day for each car, the number of colored patrons both military and civilian, and the colored percent of the total served in each check period. The Assistant Vice-President in Charge of Transportation testified that equal facilities are furnished both races (R. 203); that the location of the steward's office was no discrimination against Negroes (R. 204); that Negroes behind the partition absolutely enjoy equal facilities as whites, that there is probably less noise and confusion at the location opposite the steward office that would be if the table reserved for colored were located in the other end or body of the car (R. 205); that the colored traveler has the same advantage as the white traveler in the diner (R. 206); that the cord arrangement at the table reserved for colored is to forbid

whites to enter the space, and is similar to the cord across the steward's office, which is to keep unauthorized persons out, that the table is exclusively reserved for colored passengers and no one else will be served there at any time; that the one table is adequate to accommodate Negro patrons at the present time and based on past experience will be adequate for the future (R. 207); that the racial segregation in dining cars conforms to the court's ruling, in the prior action (R. 208); that as a general rule all passengers are assigned space in diners but are permitted to select seats in the space for whites, if there is no reason to make assignment, just as the colored patrons may do with reference to the four seats at the table reserved for them (R. 210); that the plan for permanent partitions was because the railroad thought it would be more satisfactory to everyone, would be easier to keep clean and would not require so much repair and attention (R. 213); that in making the change passengers were considered and the partitions are believed equally comfortable and convenient for them, that comfort and convenience of colored patrons was considered, that the space assigned each race is like accommodation and that assigned colored is absolutely equal to that assigned whites (R. 214).

Appellant testified in the first hearing (R. 90–108, incl.) but made no statement as to the accommodation then supposedly reserved for col-

ored patrons. Practically all evidence at first hearing referred to the specific incident of which appellant complained, and to the method of serving rather than to the comparative quality of accommodation. The method of service has since been changed by the amended rule, and the change from curtain to permanent partition has been begun and is planned for all diners. That change does relate to comparative quality of accommodations, and, as indicated by the only record evidence, is a better accommodation and absolutely equal to that for whites. The dining car waiter testifying at the first hearing (R. 134), was cross-examined by counsel for appellant with respect to quality of accommodation in the use of curtains. He stated that curtains came down to the floor but did not in the summer make it hot or warmer for colored, because the cars were air conditioned, that he could not say that passengers served at those tables were less comfortable than those in body of car, because he never heard any complaint about that (R. 142), and, upon insistence of cross examiner, stated that the comparative comfort seemed just the same to him (R. 143). He further stated that his instructions were to serve anyone seated at his tables, the assignments made by steward, and he quite often had served white and colored together at the curtained tables (R. 145), that having been started since the war. A dining car steward tes-

tified that he had never had any complaint about the use of curtains from either race (R. 162).

The Assistant Vice President in Charge of Transportation testified that he had considered the dining car service to whites and colored, made changes from time to time to meet new conditions, and in war time overcrowding arranged for serving both races at same time and increased the seating capacity from 36 to 48 (R. 165–167). He stated the Southern operated only in Southern states, where he was raised, that he was familiar with people in that area, and that the separation of races in diner service was due to the feeling and attitude of the people, and was maintained to keep peace and order on trains. In his opinion seating of white and colored passengers together would create discord and probably end in a race riot (R. 168). The dining car rules cover operations over the entire system, and operate in the light of Jim Crow laws in every state (R. 169). He testified that traffic increase, necessitating changed methods, began about 1941 due to preparation of defense projects (R. 171).

Some of these imagined inequalities appear to be based upon an idea that dining space should be allotted to colored passengers, equal in number of tables and seats, without reference to the different percent of diners, determinable from experience. Appellant makes no attempt to offer any reason, good or bad, why eight colored diners

who might apply for dining service at one time, as very rarely occurs, should be seated at one time, where no such immediate service is demanded or expected by white passengers, who normally number several times the seats reserved for them. Based upon experience, as shown by the record evidence, there is vastly less likelihood that even a single seat in the white reserve space will be vacant, than that more than four colored will apply for service at the same time.

Of the 639 total serving periods during the two tests there were no colored civilian patrons 218 times, and only 87 times have there been as many as four—just one full table. (Only 20 times have there been more than eight, requiring three servings at the colored reserved table, all of those in the 639 serving periods of the 1946 check. In the same period white patrons numbered more than three times the seats assigned to them. In 541 of the 639 serving periods of the two tests there were more white patrons than the number of seats reserved for them, requiring two or more rounds of serving. On fifteen occasions in the 1946 test there were more than four times as many whites served as there were seats reserved for them. This shows table capacity of at least 16 for a four seater table, in four rounds of serving, during a meal period. Of the 639 serving periods in the two tests only once has there been as many as 16 colored patrons, and one other time when there were more than 12, or only twice when

the colored reserved table required more than two rounds of serving. These figures fit into the totals compiled for each test period; that for 1945 (R. 225) showing total meals served 37,615 of which only 446 were colored civilian with 36,463 whites, and 3.06 percent colored, civilian and military, with 96.94 percent white; that for 1946 (R. 237) showing 20,789 total meals served, of which 723 were to colored and 19,917 to whites, or 4.20 percent colored, civilian and military, and 95.80 percent white. The table and seat asignment is one table of four seats for colored and ten tables each of four seats for whites, a ratio of ten seats for whites to one for colored. (R. 211). On this basis colored patrons are assigned a ratio of almost three times the space assigned white patrons.

These facts and figures go to show beyond a shadow of doubt that colored dining patrons of the Southern Railway, under existing rules, are not only given equal treatment with whites, but as for space are shown a preference. There is no claim even that table equipment, service, and food, is not exactly the same as served to whites. These figures show the statement in appellant's brief, page 26, that Negroes only are limited to service of four at a time, even though "every other seat in the diner may be vacant", to be completely without support in record evidence. Appellant desperately seeks to show some prejudice

and discrimination against his race, which does not in fact exist, as ancillary to the real objective, condemnation of segregation. The brief statement infers that there are occasions when more than four Negroes apply for a meal at the same time and all but four have to stand and watch ten tables practically empty because no whites appear for the meal. On the basis of test figures nearly half the time there are no colored patrons, and more than half the time the one table cares for all colored passengers at the same time. Only imagination can believe such an occasion as appellant depicts will ever occur. Even so, the rule itself requires equal treatment, and the Commission report (R. 9), noting the very small increase in colored patrons as shown by the 1941 check, stated "Should the indicated trend continue, substantial equality of treatment may require the reservation of additional accommodations for Negroes in the future." On the basis of record evidence the Commission found (R. 9), "the conclusion is inescapable that defendant's rules now provide an equitable and reasonable division between the races of its *available dining car space.*" [Italics supplied.]

In the dissent of the very learned Circuit Judge member of the statutory court below, it was stated that "segregation in railroad traffic may be maintained if there are sufficient accommodations for all, but a vacant seat may not be denied to a passenger simply because of his race" (R. 261).

The dissent is based upon the finding that one table is assigned for Negroes and ten for whites, "and the result is that occasionally a member of one race is denied service which is then available to a member of the other." This seems to mean that if one colored person applies for dining service at a moment when the reserved table for four is occupied, and if there is one vacant seat at the tables reserved for whites, that table must be given to the colored passenger. That would, under the dissent conception, avoid the one colored passenger waiting for a vacant seat at his reserved table, which would be a grave preference to him and a prejudice against the white passengers who neither demand nor expect to be relieved from the wait for seats in the more overcrowded white section. It is not believed intended by the Circuit Judge, that preferential service for colored passengers is necessary to show equality of treatment. Surely he did not mean that colored passengers are not to ever wait for dining service, although it is clearly shown by the facts herein, that white passengers in greater numbers than colored normally wait at almost every meal.

To meet that dissent requirement the railroad would have to provide more than one diner for each trip, in fact to meet every possibility every train would have to carry sufficient diners for serving every passenger at the same moment. Then instead of having a single four-seater colored table vacant through one-third of all serving

periods, as presently experienced, there would be one or two vacant dining cars, expensive equipment, costly stand-by employees, and waste of transport power, merely to make certain that no colored patron should ever wait a minute to be served. This is in the face of car shortage and inability to obtain new equipment, at least until quite recently, a matter of common knowledge, and specifically testified to in this record (R. 175). The dissenting opinion, page 40, cites, as authority for its finding, *McCabe* v. *Atchison, T. & S. F. Ry Co.*, 235 U. S. 151, 162, quoting opinion statements to effect that individuals are entitled to the equal protection of law, and the essence of the constitutional right is a personal one. There the rule involved not only equality in respect to separate coach transportation, but also to furnishing of sleeping, dining, and chair cars for white but not for colored passengers. The quoted part of the *McCabe* case opinion relates solely to the *failure to furnish any sleeping, dining and chair cars, for colored passengers.* That is not the case herein where facilities of like kind and quality are furnished, and the only question is adequacy for the future. *That necessarily relates to the fair assignment of available equipment that must be divided between white and colored.* Here there is not enough equipment to provide seats for all diner patrons at one serving, consequently all passengers must some times wait to be served. That rule applies to colored and white alike. It is diffi-

cult to conceive that assignment of more tables and seats to colored and less to whites, than now assigned, is necessary to equal treatment of colored passengers. Also there is no record evidence that a single colored diner has waited service under the present rule.

The *McCabe* case opinion clearly requires the furnishing of like and equal accommodations for white and colored, whether or not the demand therefor is enough to warrant the cost, and indicates that to furnish one race and not the other, because the demand was lacking, is a violation of rights. That would be a violation of the Interstate Commerce Act, not merely human rights commonly conceded. The quotations from the *McCabe* case opinion, "Whether or not particular facilities shall be provided may be conditioned upon there being a reasonable demand therefor," clearly refers to the demands of both races, and when provided both races, indicates approval rather than disapproval of reasonable and fair division of the available equipment.

It appears that the Commission finding as to adequacy of the dining car rule for the future, rests upon a completely rational basis, and is supported by all facts of record. The only escape from this conclusion would be through imaginative assumption of facts not in the record, and complete substitution of partisan judgment, for that of the Commission, upon a subject heretofore universally held to be an exclusive administrative

function. As was said in *Mississippi Valley Barge Line Co.* v. *U. S.*, 292 U. S. 282, 286–287, "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." In passing upon the adequacy of the railroad dining car rule, the separation of races under the same rule is not involved, since the Commission regards that question beyond its function to decide and in fact one which can only be decided by Congress. On the sole basis of equal treatment, the Commission has long been regarded by the courts as possessed of an informed judgment, needed for such decisions. As this Court said in *U. S.* v. *Chicago Heights Trucking Co. et al.*, 310 U. S. 344, 352–353, "And the Courts have always recognized that Congress intended to commit to the Commission the determination, by application of an informed judgment to existing facts, of the existence of forbidden preferences, advantages and discrimination."

It is solely upon this evidence that the question of possible preference, prejudice, and discrimination, as prohibited by the Interstate Commerce Act, must be resolved. This does not include the separate question of segregation *per se*, as a violation of the Act, hereinafter discussed. It is respectfully submitted that the entire record evidence permits only the one fact conclusion, that food, service and accommodations, are not only

substantially equal, but in practical effect are absolutely equal. Only a vivid imagination could discover inequality in the treatment accorded colored interstate passengers as revealed by this record. That kind of imagination is indulged in brief of appellant (R. 26) where it states that only Negroes are confined behind a wooden partition roped off like a stall, that only Negroes are limited to service of four at one time although every other seat in the car may be vacant, that only Negroes are compelled to sit at one table with its clatter and traffic, opposite the steward's office where waiters gather for supervision and change making at the cash register, all in the narrow confines of this area. Not one word of evidence justifies the assertion that Negro passengers are "confined" behind a partition "roped off like a stall," that only Negro passengers are limited to service of four at a time although "every other seat in the diner may be vacant," and to "invariably sit" at a table "with its clatter and traffic." The real evidence in this respect is stated above and compels the conclusion that the Southern Railroad, under its present rule and practice provides full equality of treatment for colored diners.

It is respectfully submitted that the decision of the lower court, in this respect, should be sustained.

(b) The dining car rule, effective March 1, 1946, if applied and enforced does not constitute a burden upon interstate commerce

It is here recognized that enforcement of a rule, practice or regulation of a carrier, which reasonably constitutes a burden upon interstate commerce, under record facts, would violate the provision of the Interstate Commerce Act, and within the authority of the Commission to forbid its continuance. Here the record evidence does not reasonably or even remotely support any conclusion that this dining car rule constitutes a burden upon interstate travelers. Appellant's brief almost abandoned all pretense of continuing this fictional contention, and only raises the question to add to the volume of claims, to effect that segregation is *per se* a violation of the Act and unconstitutional. No record evidence is cited to even indicate any such burden. The brief, page 69, admits that no shifting of seats is required of colored patrons, and bases its contention as to interstate burden upon unwarranted inferences and conclusions drawn from erroneous conception of facts, and deductions made upon misconception of principles taken from court opinions. The brief, pages 69, 70, 71, states that segregation by carrier rule is as much an interstate burden as a state statute which compels a passenger to accord his movement to local custom; that Negroes have no choice of accommodations in the section set aside for all other passengers, because no state can deprive him of a

choice of a place to live; that Negroes only are confined to use of one table, being the same as deprivation of property; that Negroes suffer humiliation and indignity when ostracized from everyone else; that the carrier is burdened with cost of removing curtains and installing partitions; that it is a carrier burden to determine race of passengers, in absence of statutory definitions, resulting in railroad liability; that uniformity in seating passengers is necessary and therefore segregation is unnecessary, and hampers choice of accommodations; and that there is waste of carrier revenues and accommodations.

These assumptions are not warranted by any record evidence and, unfortunately are largely based upon the long cultivated tragic conception that colored people are considered inferior and have been imposed upon by white people or certain classes of white people. Some 50 years ago in *Plessy* v. *Ferguson, supra,* page 551, Mr. Justice Brown properly described this character of complaint, as "assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."

The statement that segregation by carrier rule burdens interstate commerce as much as if done by state statute, obviously attempts to read that principle into the opinion in *Morgan* v. *Virginia,*

328 U. S. 373. That opinion is not here understood to state or even imply any such principle. That stated by the court is that a statute is invalid if it imposes a burden upon interstate commerce, and page 378, "Within the broad limits of the principle, the cases turn on their own facts." The opinion added, page 380, that the Constitution gave Congress rather than the states ultimate power to regulate commerce. Therefore, the burden upon commerce imposed by a state may be weighed by federal courts to decide whether or not the state statute is unconstitutional. This court authority under state statute was in contrast to federal regulation, as there held, since Congress, within limits of the Fifth Amendment, could burden commerce if that seemed desirable to it. In the *Morgan* case the state statute required segregation where Congress had not acted and the court, upon facts it found and stated, held the statute unconstitutional. As the Court states that case simply turned upon its own facts. Here we deal with a different state of facts.

The most notable fact difference between the *Morgan* case and that presented by this appeal, is that the former involved segregation by state statute, while in the latter segregation is under carrier rule. The *Morgan* case opinion, page 380, said, "This statute is attacked on the ground that it imposes undue burdens on interstate commerce." The state statute was held invalid solely

on the ground that it constituted a burden upon interstate commerce, page 386, "on the challenge that it interferes with commerce, as a matter of balance between the exercise of the local police power and the need for national uniformity in the regulations for interstate commerce." The facts found to constitute such a burden are stated in the opinion, page 381, as "changes in seat designation might be made 'at any time'"; an interstate passenger must if necessary repeatedly shift seats; busses may pass through Virginia in the day or night and enforcement of the requirements for seating would be disturbing. In appraising the weight of the burden of the state statute, cumulative effects may be considered as making local regulation impractical, consideration was given to statutes of other states, different methods of identification as white or colored, with indication that such "cumulative effect" would not be applicable except as to state statutes.

The opinion makes it very clear that a uniform carrier rule, applicable over an entire system as here operating within the South, where every state maintains local segregation by statute, may provide segregation lawfully, where the state statute attempting the same thing within the state boundary, would be invalid. The difference is that the statute may be, depending upon the facts of a particular case, a burden upon commerce, whereas carrier rules apply to the entire

system, provide uniform regulation, and therefore is not a burden. The *Morgan* case recognized exclusive power of Congress to regulate interstate commerce, even to authorize a burden upon it, where that is the legislative will, except for limitation of the Fifth Amendment. Congress regulates railroads through its administrative aid, the Commission, and in this manner carrier rules are made to conform to the legislative concept. If a particular rule does not so conform Congress has the opportunity and power to compel its change through the Commission. In this way a carrier rule, unless contrary to specific Congressional regulation, carries the assumption of Congressional approval, because of non-action upon the subject, as this Court has held. This principle is clearly stated in *Chiles* v. *Chesapeake & Ohio Railway, supra,* where, in referring to the *Hall* v. *DeCuir* case, it was said, pp. 75–76:

> The court said, by Chief Justice Waite, after stating that the power of regulating interstate commerce was exclusively in Congress, "This power of regulation may be exercised without legislation as well as with it." And that, "by refraining from action, Congress, in effect, adopts as its own regulations those which the common law or the civil law, where that prevails, for the government of such business." The court further said, quoting from *Welton* v. *The State of Missouri,* 91 U. S. 282,

"'that inaction [by Congress] is equivalent to a declaration that interstate commerce shall remain free and untrammeled.'" And added, "Applying that principle to the circumstances of this case, Congressional inaction left Beason [the ship owner] at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat while pursuing her voyage within Louisiana or without as seem to him most for the interest of all concerned." This language is pertinent to the case at bar, and demonstrates that the contention of the plaintiff in error is untenable. In other words, demonstrates that the interstate commerce clause of the Constitution does not constrain the action of carriers, but on the contrary leaves them to adopt rules and regulations for the government of their business, free from any interference except by Congress.

* * *

This legal standing of carrier rules is emphasized in the *Morgan* case opinion, pages 383, 384, where referring to the *Hall* v. *DeCuir* case, the opinion obviously approved that decision, and to clarify the *Morgan* case decision, quotes at length from the opinion of Mr. Chief Justice Waite, page 489, as follows:

It was to meet just such a case that the commercial clause in the Constitution was adopted. The river Mississippi passes through or along the borders of ten different States, and its tributaries reach

many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own pas engers and regulate the transportation of its own freight, regardless of the interests of others. Nay more, it could prescribe rules by which the carrier must be governed within the State in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a State line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separated. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it, Congress, which is untrammeled by States lines, has been invested with the exclusive legislative power of determining what such regulations shall be.

This appeal presents a different legal and factual situation, than in the *Morgan* case, and the

same or similar facts, held a commerce burden in that case would not compel the same decision as to the carrier rule here involved. Here the facts are not only different, but clearly prove there is no burden upon commerce because of the dining car rule. The big fact in the *Morgan* case which led to annulling the state statute was the required changing of seat, sometimes at night. Appellant concedes that the carrier rule here involved does not necessitate change of seat. Other alleged facts, referred to in the brief as supporting the claim that the rule burdens commerce, relate to cost of partitions, waste of space, loss of trade, and several other factors which can only be understood as restating the personal opinion of appellant and his counsel, that they believe all segregation should be forbidden, particularly by the Commission as to that relating to interstate travel. They object to cost items, to what they term waste of space, and to the loss of business, although the carrier does not complain. There is no evidence to support such imagined burdens, and the only evidence is to the contrary. That was submitted by the carrier. It is to be supposed that the carrier knows its business, what is economically best, and what the vast majority of its patrons prefer in equipment and service. No white passengers testified on this record as to their attitude on this subject, but railway management did and stated that practice and custom for years demands segregation. If, as implied

in appellant's brief (page 35), white passengers generally do not object to mixing races in diners, it is odd that those sentiments are not communicated to railroad officials, or to law makers who could change such laws. Appellant and his counsel have offered no evidence in this record that either white or colored passengers object to separate dining service, where there is equality of treatment, and therefore is in no position to speak for either race. The fact that an occasional white patron, during crowded war conditions, took a seat at the table reserved for colored and was served with them, without protest from anyone, does not prove that the vast majority of passengers would willingly accept non-segregated service. At least experienced and informed railroad officials regard segregation as essential to their business, in order to keep peace and order between the races.

It may be that the allegation of violation of Section 1 (4) of the Act intends that as a burden upon interstate commerce. This record does not show that appellant or any other colored passenger traveled on this or any other occasion, as a part of joint or through route. Appellant was a passenger on this occasion solely over the Southern Railroad (R. 91). Even so it cannot be questioned that "reasonable facilities" for its operation, however that may be described, and the "reasonableness of the rule respecting dining car operation" is the subject of this litigation.

There is little or no record evidence upon which to base a conclusion respecting reasonable facilities, except the dining service. If the contention refers to additional cars, there is nothing to show that available space was inadequate for the traffic, although crowded, and the affirmitive proof that additional car equipment was practically impossible to obtain. This allegation of violation of specific provisions of the Act, also appears based solely upon opinion of appellant and his counsel, unsupported by evidence, that any rule to be reasonable must compel white and colored passengers to be commingled in dining car service. That is so obviously not contemplated or required by Section 1 (4), as to need no further comment.

(c) The Southern Railway dining car rule, requiring separate service for white and colored passengers, does not constitute a violation of the Interstate Commerce Act, if equal treatment is otherwise provided for each race

Questions 1 and 3 stated in brief of appellant, page 5, contend that racial segregation violates the Interstate Commerce Act, without reference to the dining car rule here involved, to the practice of the Southern Railway, or to any other specific rule, regulation, or practice of this or any other carrier. The questions as stated, the second alleges segregation to be a violation of the Fifth Amendment to the Constitution, and contrary to the National Transportation Policy and Public Policy, appear to very simply and directly contend that any and all segregation, or separation of races

under either state law, carrier regulation, or business practice, violates the Constitution of the United States and, as here immediately concerned, the Interstate Commerce Act. Record evidence herein is clear and unmistakable that equality of treatment is provided colored passengers under the dining car rule. The question of equal treatment affords only the legal opportunity to demand the court decree condemning segregation.

The first answer to this contention is that separation of races in interstate travel, under all prior judicial authority, is not a violation of the Interstate Commerce Act. On the basis of legislative and judicial history relating to the subject, showing refusal to adopt laws or to construe the Constitution and Acts of Congress as forbidding segregation in interstate commerce, it seems preposterous to expect the Interstate Commerce Commission, in this case, to overrule both courts and Congress, and now forbid that segregation by an order to the Southern Railway, effective with all carriers. The real question here is whether or not the Commission erred, as a matter of law, in declining to issue such an order. It is not, as appellant's brief would have one think, a question of personal or official views, or even judicial concept of constitutional rights, for the moment not referring to the Fifth Amendment. Jurisdiction and procedure in which the question is here presented, are special provisions of law, and limited in authority to matters that are controlled by the

Interstate Commerce Act. The broad general question of race segregation, as possible infringements of personal rights, belongs to established courts of general jurisdiction, and not to administrative arms of government. Provisions of law permit review of Commission orders, by a special court of limited jurisdiction, to determine whether or not such orders are *within the scope of statutory authority, supported by evidence, and do not affect constitutional power.* This is the principle of jurisdiction stated in *Rochester Tel. Corp.* v. *U.S.*, 307 U.S. 125, 139–140:

> From these general considerations the Court evolved two specific doctrines limiting judicial review of orders of the Interstate Commerce Commission. One is the primary jurisdiction doctrine, firmly established in *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. Thereby matters which call for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked. The other is the doctrine of administrative finality. Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable. *Interstate Commerce Comm'n* v. *Illinois*

Central R. Co., 215 U. S. 452, 470; *Interstate Commerce Comm'n* v. *Union Pacific R. Co.*, 222 U. S. 541.

The only possible constitutional question here involved relates to interstate commerce, in respect to which courts cannot invalidate federal legislation, even if that burdens the commerce, within the limits of the Fifth Amendment. *Morgan* v. *Virginia, supra,* page 380. It is obvious from the argument that appellant regards separation of races in interstate travel a violation of guarantees to colored persons under the Constitution. Some seventeen pages of the brief are devoted to the charge that segregation violates the Fifth Amendment, and the supporting arguments relate to property and political rights, threatened or damaged by provisions of state laws or private acts. No one would claim that Congress or an agency of government has power to deprive any one of rights guaranteed by the Constitution. The difficulty involved is usually whether or not any such right is in fact threatened. In discussing due process of law and the Fifth Amendment, in *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324, cited in appellant's brief, page 50, the court said:

> The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It

> is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process "due process of law" by its mere will. To what principles, then, are we to resort to, ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. *We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions.* * * *

The right in question must be recognizable under the Constitution, or as established by interpretation of judicial authority. To know what, if any, force this contention of appellant is entitled to, we must first determine existence of the right claimed here that separation of races under this dining car rule, that is segregation per se, deprives appellant and other colored passengers of their constitutional rights. Very definitely no such right is guaranteed by any provision of the Constitution, extended by any Act of Congress, or recognized by any authoritative court decision. On the contrary, Congress has repeatedly, as above cited, refused to enact legislation prohibiting segregation in interstate travel, and courts have for many years unanimously held that segregation per se is not a

violation of any constitutional right, or at most refused to hold that it was a violation, either of the constitution or of the commerce act. Such legislation is pending before the present Congress. Even appellant, brief page 48, concedes that "Congress * * * has plenary control over interstate commerce, and, by the Interstate Commerce Act, has invested the Interstate Commerce Commission with primary jurisdiction to determine the lawfulness of an interstate carrier's regulations and practices." There appears to be no right of appellant or other colored people, either constitutional or otherwise recognized by law, which is violated or threatened by the dining car rule, based solely upon segregation therein prescribed.

Railroad Co. v. *Brown,* 84 U. S. 445, is a very early case in which Congress exercised its plenary power to forbid segregation, as a condition to extension of operations into Washington. That case supports no theory of appellant, but vividly points to the later repeated refusal of Congress to forbid segregation in any other interstate commerce, as authority to carriers to continue segregation rules and practices. In *Welton* v. *State of Missouri,* 91 U. S. 275, 282, it was held that "inaction [by Congress] * * * is equivalent to a declaration that interstate commerce shall remain free and untrammelled." This could mean only that carriers would be authorized to operate under their own rules in respect to mat-

ters not acted upon by Congress. This is indicated later in the *Hall* v. *DeCuir, supra,* opinion, where the above language of the *Welton* case opinion is quoted, page 490, in holding a state statute prohibiting segregation invalid, as constituting a burden upon commerce, where the uniform carrier rule required segregation. Inaction of Congress upon the subject of segregation was there construed as permitting the boat operator to adopt "such reasonable rules and regulations for the disposition of passengers * * * as seemed to him most for the interest of all concerned." Obviously the Court there thought the carrier best qualified to know the interests of his patrons, and was of the opinion that segregation was not, *per se,* violative of any rights.

Plessy v. *Ferguson, supra,* established principles as to race segregation in relation to due process under the Fourteenth Amendment, power of Congress over interstate commerce, and limitations upon state authority to provide and enforce separation of races. There a state statute required railways to provide equal but separate accommodations for the white and colored races, and prohibited any person to occupy seats in coaches other than those assigned to them on account of race to which they belong, with authority to carrier officials to make such assignments. Plessy claiming seven-eighths Caucasian and one-eighth African blood, and that the mixture of

colored blood was not discernible, refused assignment of railroad officers and took a seat in the white coach, resulting in forcible ejectment and charge of violating the state statute. The opinion considered and decided almost every question relating to segregation that has been raised in the more than half century since issued, including practically every contention made herein by appellant. The chief difference in the principles stated in the *Plessy* case opinion and those here involved, is that the first concerned a state statute and the instant case a carrier rule, as in the *DeCuir* case where the conflicting carrier rule caused the Court to invalidate the state statute. In the *Plessy* case there was no conflict with carrier rule and the statute was held valid.

In holding segregation not prohibited by the Fourteenth Amendment the Court said, page 544:

> The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. * * *

On the score of "property" rights, similar to that claimed by appellant, the opinion stated, page 548:

> While we think the enforced separation of the races, as applied to the internal

> commerce of the State, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the Fourteenth Amendment, * * *

As to race determination in making assignment of space, a question raised by appellant's argument, the opinion held that carrier power to assign carries the power to determine race, in the following language, page 549:

> The power to assign to a particular coach obviously implies the power to determine to which race the passenger belongs, as well as the power to determine who, under the laws of the particular State, is to be deemed a white, and who a colored person. * * *

The opinion disposes of appellant's contention, that his claimed right allegedly denied by segregation, is property, in the following language, page 549:

> It is claimed by the plaintiff in error that, in any mixed community, the reputation of belonging to the dominant race, in this instance the white race, is *property*, in the same sense that a right of action, or of inheritance, is property. Conceding this to be so, for the purposes of this case, we are unable to see how this statute deprives him of, or in any way affects his right to, such property. * * *

Further discussing possible conflict of the state statute with the Fourteenth Amendment, the court established the test of reasonableness, to decide statutory validity, in respect to which the opinion said, pages 550–551:

> So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in pubic conveyances is unreasonable, * * *.

And in holding the state segregation statute to be valid, the opinion concluded with a clear and powerful statement upon the general subject of race relations, the error in colored race conception of inferiority, and reasons why segregation can be discontinued only by voluntary consent of individuals and mutual appreciation by the two races. The concluding statement at pages 551–552, is:

> We consider the underlying fallacy of the plaintiff's argument to consist in the

assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. As was said by the Court of Appeals of New York in *People* v. *Gallagher*, 93 N. Y. 438, 448, "this end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law and

equal opportunities for improvement and progress, it has accomplished the end for which it was organized and performed all of the functions respecting social advantages with which it is endowed." Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.

In more than half a century since *Hall* v. *DeCuir* and *Plessy* v. *Ferguson,* one sustaining a carrier rule, the other a state statute requiring segregation, courts have followed the legal reasoning and principles established by those decisions. There have been a constant, perhaps an increasing, stream of segregation cases decided by the courts, not only involving transportation but practically every other phase of life in which the two races come in contact. Many cases have found violations, in particular incidents, of various laws requiring equal treatment, but no case, although most if not all presented opportunity to so decide the question, has ever held that segregation per se is forbidden by the Constitution, by Act of Congress, or by any prior court de-

cision.[18] Every decision has emphasized the certainty of court opinion that segregation per se is not forbidden by the Constitution, or by any Act of Congress, with the added warning that only Congress could adopt such legislation, as was reiterated in the *Morgan* case, page 380, where this Court said, "The courts could not invalidate federal legislation * * * because Congress * * * has authority to burden commerce if that seems to it a desirable means of accomplishing a permitted end." Even appellant admits that Congress has the power to forbid segregation, a statement with which all informed legal opinion, including this Court, agrees. Strangely that power of Congress is not here being appealed to, but the effort is to have first, the Commission by administrative fiat, unauthorized by statute and contrary to the plainly indicated will of Congress, forbid segregation in interstate transportation, and second, having failed in that attempt, to here demand of this Court, upon review of a Commission order with its narrow jurisdictional limits, that it forbid segregation, although having clearly held that to be the exclusive function of Congress.

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[18] *Matthews* v. *Southern Railway System*, 157 F. 2d 609, may be an exception, as the court there stated in a footnote, without relevancy to issues upon which the decision is based, as to the Virginia statute requiring segregation, "That question has been settled by *Morgan* v. *Virginia*, 1946, 66 S. Ct. 1050." Of course, the Morgan case settled only the status of statutes, and did reaffirm the different principle which makes carrier rules valid.

No attempt is here made to quote from or to cite all the many segregation case decisions of this and lower courts. Those of most value herein relate to transportation and particularly to carrier rules rather than state statutes. Many decisions do relate to matters other than transportation and will, where deemed desirable, be later discussed. The following cases involving transportation affirm principles established in the *DeCuir* and *Plessy* cases.

Louisville Etc. Railway v. *Mississippi,* 133 U. S. 587, approved as lawful a state statute requiring carriers to provide separate equal accommodations for colored and white passengers, where the carrier was charged with failure or refusal to provide such accommodations. That case involved only intrastate passengers, the state court holding, "We have nothing whatever to do with it as a regulation of interstate commerce," the state court opinion being further quoted with approval, as stating, "But we think that it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, *does encroach upon the exclusive power of Congress.*" [Italics supplied.] In the similar case of *Chesapeake and Ohio Ry. Co.* v. *Kentucky,* 179 U. S. 388, a carrier charged with violation of a state statute requiring separate but equal accommodations for white and colored intrastate passengers, because of failure to provide such accommodations, the statute

was held valid. Obviously in both these cases the statutes might have been invalidated by decision that segregation *per se* violates some constitutional right.

Chiles v. *Chesapeake & Ohio Ry.*, 218 U. S. 71, involved a carrier rule providing for separation of white and colored passengers, where an interstate colored passenger from Washington to Lexington, Ky.; on first-class ticket, was removed under protest from car exclusively assigned whites, to another of equal quality exclusively assigned to colored passengers. The colored passenger brought suit for damages against the railroad in the state court, tried before jury with verdict against him and judgment for railroad. The court and jury found that accommodations were of substantial equal quality. The Court opinion upon appeal, page 74, stated the issues as resting upon "the contention that, as against an interstate passenger, the regulation of the company in providing different cars for the white and colored races is void." The state statute was held inapplicable to interstate passengers, conforming to decision in *C. & O. Ry.* v. *Kentucky*. Drawing the distinction between state statutes and carrier rules requiring segregation, the court said, page 75:

> The elements of that question have been considered and passed on in a number of cases. And we must keep in mind that we are not dealing with the law of a State attempting a regulation of interstate commerce beyond its power to make. We are

> dealing with the act of a private person, to wit, the railroad company, and the distinction between state and interstate commerce we think is unimportant.

In referring to language of the *DeCuir* opinion as quoted from *Welton* v. *Missouri, supra,* to the effect that inaction of Congress left interstate commerce free, and permitted carriers to adopt reasonable rules for disposition of passengers, the court stated, page 76:

> This language is pertinent to the case at bar, and demonstrates that the contention of the plaintiff in error is untenable. In other words, demonstrates that the interstate commerce clause of the Constitution does not constrain the action of carriers, but on the contrary leaves them to adopt rules and regulations for the government of their business, free from any interference except by Congress.

In referring to the opinion in *Plessy* v. *Ferguson,* with particular reference to constitutional rights involved in segregation, the Court said, page 77:

> It is true the power of a legislature to recognize a racial distinction was the subject considered, but if the test of reasonableness in legislation be, as it was declared to be, *"the established usages, customs and traditions of the people" and the "promotion of their comfort and the preservation of the public peace and good order,"* this must also be the test of the reasonableness

> of the regulations of a carrier, made for like purpose and to secure like results. *Regulations which are induced by the general sentiment of the community for whom they are made and upon whom they operate, cannot be said to be unreasonable.* * * * [Italics supplied.]

And in conclusion the Court stated, page 77:

> The extent of the difference based upon the distinction between the white and colored races which may be observed in legislation or in the regulations of carriers has been discussed so much that we are relieved from further enlargement upon it. * * *

That Court statement was made almost forty years ago and shows even then, the well established principle that segregation *per se* is not a violation of the Constitution and, in absence of congressional action, leaves the carrier free to apply its rules with such requirements to interstate passengers.

McCabe v. *Atchison, Topeka & Sante Fe Railway Company*, 235 U. S. 151, decided in 1914, long after adoption of section of the Commerce Act, was an action in federal court to restrain several railroads from making any distinction in service on account of race, and to enjoin compliance with state statute requiring separation of races, in coach travel, but permitting sleeping, dining, and chair cars exclusively for whites. The opinion first noted that the carriers "provide no

similar accommodations for Negroes", and said, page 161, "The reasoning is that there may not be enough persons of African descent seeking these accommodations to warrant the outlay in providing them. * * * "This argument with respect to volume of traffic seems to us to be without merit." Appellant here, brief page 56, vainly contends that this and other cases did not decide the issue as to segregation. The question of validity of segregation, even under a state statute, was clearly presented in this case and a decision upon appeal that segregation *per se* is unlawful would have invalidated the statute. The opinion plainly indicated adherence to prior decisions on the subject and stated, "but, if facilities are provided, *substantial equality of treatment of persons traveling under like conditions cannot be refused.*" [Italics supplied.] There could be no purpose or understanding of this statement unless it contemplated "separate" facilities. And to make this clear it was added, page 162, "if he is denied by a common carrier, * * * a facility or convenience * * * which *under substantially the same circumstances* is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded." [Italics supplied.] There could be no meaning in the use of the phrases "substantial equality" and "substantially the same circumstances", except as that relates to separate service, recognized as a valid requirement under carrier rule, as to inter-

state, and under state statute, as to intrastate passengers.

Mitchell v. *United States*, 313 U. S. 80, decided 1941, involved a procedure practically as that herein, with the difference that the carrier action was under state statutes, not its own rule, that the Commission did not there find discrimination and prejudice against complainant in the incident, as was found herein, and the change in separate coach facility, obviously not assurance of equal treatment, whereas here the change of rule conclusively assures equal treatment. The opinion carefully states the issues there presented, that the Commission had authority to decide whether or not a discrimination by a carrier is unjust and unlawful, under particular facts of the case, that the District Court had jurisdiction to review the Commission action, the review question being whether or not the action accorded with applicable law, that facts of case were determinative of the discrimination charged, that "The question whether this was a discrimination forbidden by the Interstate Commerce Act is not a question of segregation but one of equality of treatment", and that denial of equality of accommodations because of race would be an invasion of fundamental rights. Clearly the issue of segregation *per se* was before the court, and if deemed by the Court unlawful, a decision so holding would have avoided meticulous consideration

of state statutes, carrier practices, discrimination and prejudice involved, and facts relating thereto. Why devote so much effort to clarifying differences between individual and group rights, if segregation itself, violates the Constitution or the Interstate Commerce Act? Why state so deliberately that the question was "one of equality of treatment", not one of segragation, when there could have been no question without the segregation? The basis of the decision was that colored passengers were not given accommodations equal to white passengers, page 96, that inequality persists with respect to dining car and observation-parlor car accommodations, and finally, page 97, that, "It is enough that discrimination shown was palpably unjust and forbidden by the Act." It is respectfully submitted that this opinion conforms to previous decisions and supports the lower court holding herein that "segregation * * * is not *per se* forbidden by the Constitution, the Interstate Commerce Act, or any other Act of Congress".

And the last, perhaps the most important case, *Morgan* v. *Virginia,* has been discussed to some extent above. As here believed, that opinion carefully and fully conforms to principles that have been applied by this Court since the *DeCuir* and *Plessy* decisions. The opinion leaves no doubt that the decision rendered is based upon the court finding, that the state statute imposed a burden upon interstate commerce. Nothing in the opin-

ion justifies a conclusion that the court there decided segregation *per se* to be unlawful for any reason. On the contrary the opinion carefully distinguished between the burden found under state statute, and the lawfulness of carrier rules requiring segregation. In so doing the opinion noted the ultimate power of Congress to regulate commerce, and to burden that commerce if that seemed to it desirable. The citation and long quotation, with approval, from the *DeCuir* case opinion, appears to remove all question that this court in the *Morgan* case, considered segregation under reasonable carrier rules, in the absence of contrary action by Congress, where there is no inequality of treatment and no burden upon interstate commerce, as a valid and lawful requirement. If that is not what the court intended it must be recognized that a really perfect legal opportunity was overlooked to declare segregation per se, a violation of the Interstate Commerce Act or of the Constitution, if that by any chance was an intended implication.

Insofar as can be determined every court decision upon the subject, whatever the segregation relates to, since the *Morgan* case decision by this Court, has interpreted that opinion as adhering to the long established principle of the *DeCuir* and *Plessy* cases, that segregation *per se* is not forbidden by the Constitution, the Interstate Commerce Act, or any other Act of Congress, and that, in the absence of action to the

contrary by Congress, carriers may lawfully provide for segregation under reasonable rules provided there is equality of treatment. A number of these cases relate to transportation.

Simmons v. *Atlantic Greyhound Corp.*, W. Dist., Virginia, decided December 30, 1947, 75 F. Supp. 166, squarely presents the question of lawfulness of a carrier rule requiring segregation of an interstate passenger, where there was no discrimination involved, and issues were practically resolved upon refusal of plaintiff to be seated in the section of the bus assigned to colored people, claimed to be a violation of constitutional rights under the Fourteenth Amendment, Section 1, and of civil rights under Title 8 U. S. C. A., Section 43. The court held, page 169, that no cause of action was shown as to claimed violation of constitutional and statutory civil rights, under court authorities, and said:

> The Supreme Court has consistently held that there is no infraction of the Fourteenth Amendment by a requirement for separate accommodations for white and colored persons on public carriers so long as the accommodations are equal. See *Plessy* v. *Ferguson*, 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256; and *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151, 160, 35 S. Ct. 69, 59 L. Ed. 169.

The opinion stated that the case was apparently inspired by *Morgan* v. *Virginia*, *supra*, and that plaintiff sought to bring his case within those principles. Speaking of the *Morgan* case, page

170, the Court said, "There is nothing in it which overrules, or even discusses, the principles laid down in *Plessy* v. *Ferguson, supra,* and in *McCabe* v. *Atchison, T. & S. F. Ry. Co., supra,* and these cases are, I take it, still authority for what was decided in them." The opinion followed with the statement, page 173:

> The plaintiff appears to understand the decision in the Morgan case as being a judicial determination that any attempted separation of white and colored persons on a public carrier is illegal as applied to an interstate passenger, no matter by what authority or under what circumstances the attempt is made. I do not so construe it. I do not understand that the court in that case, or in the *DeCuir* case, asserted or assumed the power to impose regulations governing interstate traffic, but only that it denied the right of a state to interfere with such commerce. The distinction becomes important when, as in the instant case, we are dealing, not with a state statute but with the effect of a custom or rule adopted by the carrier in connection with the operation of its business. * * *

The Court held that "The right of a common carrier to adopt and enforce reasonable regulations governing the operations of its business has always existed." In approving reasonableness of the carrier rule and lawfulness of segregation thereunder, opinion testimony of three Presidents of bus companies and of public offi-

cials of two states was noted, to the effect that separation of white and colored bus passengers within the territory, was desirable and in the interest of both races. With reference to authority of Congress, Courts, and the Commission to decide the right of carriers to separate races, the opinion said, page 176:

> It must be repeated and steadily borne in mind that the power to regulate interstate commerce is vested in Congress. This power Congress has, within certain limits, delegated to the Interstate Commerce Commission. To what limits the powers of this latter body extend need not be inquired into. The fact remains that neither Congress nor any agency created by it has sought to impose any regulation dealing with the separation of passengers in interstate commerce. The fact that such separation has long been enforced in a number of states by custom and by the rules of common carriers operating in such states is a matter of public knowledge of which the members of Congress are fully aware. In fact, although efforts have been made over some years to induce Congress to enact legislation on this subject, it has consistently refused to attempt such regulation. There can be no other inference than that Congress has thought it wise and proper that the matter should be left for determination to such reasonable rules as the carriers might themselves adopt and that it considered that rules providing for the seg-

> regation of passengers in those sections where they were applied were reasonable ones. By its refusal to nullify the practices and regulations of these carriers in respect to the separation of passengers, Congress has by the strongest implication given its approval to them. This is a field of Congressional duty and responsibility. This court cannot invade it and, by usurping the powers of Congress, lay down rules by which this defendant must guide the operation of its business—rules which Congress, in the exercise of power specifically and solely entrusted to it, has refused to lay down.

Solomon v. *Pennsylvania R. Co., et al.*, 79 F. Supp. 449, Dist. of New York, decided July 22, 1948, involved a carrier rule requiring separation of races. Traveling upon a coach ticket from New York to Florida, plaintiff was compelled by carrier officers to move into the all colored coach. Defense was based upon the right to require separate accommodations of equal quality for white and colored passengers, and the motion of plaintiff to strike that defense was denied. This case raised the question of lawfulness of segregation *per se*, under reasonable carrier rules, and the opinion of the Court very clearly holds that the *Morgan* case decision did not decide that segregation *per se* under a carrier rule is invalid. That Court opinion fully sets forth its position in respect to the *Morgan* case, as stated page 450:

The plaintiff's position seems to be that the cases of *Morgan* v. *Virginia*, 328 U. S. 373, 66 S. Ct. 1050, 90 L. Ed. 1317, 165 A. L. R. 574, and *Mattews, et al.* v. *Southern Railway System*, 81 U. S. App. D. C. 263, 157 F. 2d 609, which hold that state segregation statutes covering both interstate and intrastate motor carriers or railroad carriers are invalid because they burden interstate commerce contrary to Art. 1, Sec. 8, Cl. 3 of the Constitution of the United States, which makes a railroad company's segregation rule per se invalid. *Morgan* v. *Virginia, supra,* deals with a state statute and specifically recognized the right of a carrier to make reasonable rules and regulations. 328 U. S. 373, 377n12, 66 S. Ct. 1050, 90 L. Ed. 1317, 165 A. L. R. 574. This case reiterated the controlling effect of *Chiles* v. *Chesapeake & Ohio Railroad*, 218 U. S. 71, 30 S. Ct. 667, 54 L. Ed. 936, 20 Ann. Cas. 980, which held that a railroad could make reasonable rules and regulations as to the segregation of colored and white passengers in interstate travel.

Day v. *Atlantic Greyhound Corp.*, Court of Appeals, Fourth Circuit, decided December 7, 1948, 171 F. 2d 59, affirmed the district court judgment for defendant. The action, as described in the court opinion, page 60, was for personal damages because of enforcement of carrier rule requiring segregation of white and colored passengers. Reasonableness of the regulation was decided by jury verdict for defendant.

The opinion of the learned Circuit Judge Soper fully and ably states the question presented and decided with particular reference to the *Morgan* case decision, as follows, page 60:

> The most important legal question on this appeal is raised by the contention of the plaintiff that any rule of a common carrier which imposes racial segregation upon its passengers not only contravenes the principles of the common law, but violates the Fourteenth Amendment of the Federal Constitution. This question, however, is not open to debate in this court. It is foreclosed by binding decisions of the Supreme Court which hold that an interstate carrier has a right to establish rules and regulations which require white and colored passengers to occupy separate accommodations provided there is no discrimination in the arrangement. * * * In *Morgan* v. *Virginia*, for example, it was held that a Virginia statute which requires motor carriers to allocate seats to white and colored passengers so as to separate the races, and requires passengers, if necessary, to change their seats repeatedly in order to comply with the allocation, imposes an undue burden on interstate commerce and therefore violates Article 1, Sec. 8, Cl. 3 of the Federal Constitution. Nevertheless, in this very case the court pointed out that it was dealing with a state statute and not with a regulation of the carrier;

and the court referred specifically to its earlier decision in *Chiles* v. *Chesapeake & Ohio R. Co., supra,* in the following language, 328 U. S. 373, 377, Note 12, 66 S. Ct. 1050, 1053, 90 L. Ed. 1317, 165 A. L. R. 574: "When passing upon a rule of a carrier that required segregation of an interstate passenger, this Court said, 'And we must keep in mind that we are not dealing with the law of a state attempting a regulation of interstate commerce beyond its power to make.' *Chiles* v. *Chesapeake & Ohio R. Co.,* 218 U. S. 71, 75, 30 S. Ct. 667, 668, 54 L. Ed. 936, 20 Ann. Cas. 980." Since the Chiles case expressly sustained the power of an interstate carrier to issue a segregation regulation, provided that it is not discriminatory, our inquiry must be limited to the nature of the regulation enforced in the pending case, and we may not inquire whether the segregation of the races in public vehicles is in itself inherently discriminatory.

And in *Pridgen* v. *Carolina Coach Co.,* 47 S. E. 2d 609, decided May 5, 1948, the Supreme Court of North Carolina sustained as lawful a bus carrier rule requiring separation of white and colored passengers, where equal accommodations were provided. This case, as did the three cases discussed immediately above, presented the exact question of lawfulness of segregation *per se* under carrier rules, and in each the Court held that the decision of this Court in *Morgan* case, had not

changed the established court principle, that such rules are valid where there is equality of service. The following quotations from the North Carolina Supreme Court opinion vividly express this view, pages 611–612:

> Moreover, we know of nothing that makes segregation *per se* unconstitutional or violative of any act of Congress. The discrimination forbidden by the Interstate Commerce Act, 49 U. S. C. A. Sec. 1 et seq., "is not one of segregation, but one of equality of treatment." *Mitchell* v. *United States,* 313 U. S. 80, * * * the Supreme Court of the United States held in effect that in the absence of legislation by Congress, a common carrier is at liberty to adopt such reasonable rules and regulations for the separation of the white and Negro races as seems to it to be for the best interest of all concerned. * * * Surely segregation, in the absence of any discrimination in favor of or against the white or Negro race, does not constitute a burden on interstate commerce. * * * Evidently the plaintiff is under the impression that the recent decision of the Supreme Court of the United States, in *Morgan* v. *Virgina, supra,* is a judicial determination that any law enacted by a State or any regulation adopted by a common carrier, which requires the separation of the white and Negro races, in public conveyances, is illegal and may be ignored by interstate passengers. We do not so interpret the opin-

> ion. * * * Furthermore, we know of no decision of the Supreme Court of the United States which holds that an interstate motor carrier may not adopt rules and regulations reserving full control and discretion as to the seating of passengers, and may not further reserve the right to require passengers to change seats at any time during a trip. *Simmons* v. *Atlantic Greyhound Corporation, supra.*

In addition to the above court authorities, the Commission has decided several segregation cases, in which interpretation of the Morgan case decision has been applied similar to those of the court opinions.

Stamps and Powell v. *Louisville & N. R. R. Co.*, 269 I. C. C. 789 (1948), involved a different carrier dining car rule than that here involved, which was adopted after the incident therein and after the first *Henderson* court case decision herein. That rule provided separation by curtains behind the first two tables, one on each side of aisle, next kitchen end of car, with those two tables exclusively assigned colored, and remaining tables in car assigned to white passengers. Complainants Stamps and Powell contended that segregation of interstate passengers is *per se* a violation of the Constitution and of Sections 2 and 3 of the Act. The Commission found in respect to this contention as follows, page 794:

> Complainants contend that racial segregation of interstate passengers is per se a

violation of the Constitution and of sections 2 and 3 of the act. The Supreme Court repeatedly has held that State statutes requiring the segregation of Negro and white intrastate passengers are not invalid or unconstitutional per se. *Plessy* v. *Ferguson*, 163, U. S. 537; *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151; *Chesapeake & O. Ry. Co.* v. *Kentucky*, 179 U. S. 388; *Louisville N. O. & T. Ry. Co.* v. *Mississippi*, 133 U. S. 587. And segregation by State law is not per se an abridgement of any constitutional right secured to the citizen. *Henderson* v. *United States, supra.* In *Hall* v. *DeCuir*, 95 U. S. 485, a State statute prohibiting segregation of interstate passengers in steamships, and in *Morgan* v. *Virginia*, 328 U. S. 373, following *Hall* v. *DeCuir, supra,* a State statute requiring segregation of interstate passengers in motor-busses, were held to be invalid as imposing a burden on interstate commerce. In none of the cases cited, nor any other case that has been called to our attention, did the Court hold segregation to be unconstitutional per se or violative of any act of Congress. In *Mitchell* v. *United States*, 313 U. S. 80, the Court impliedly found segregation to be not unlawful insofar as the Interstate Commerce Act is concerned, saying: "The question whether this was a discrimination forbidden by the Interstate Commerce Act is not one of segregation, but one of equality of treatment."

In recognition of power of Congress to enact laws regulating interstate commerce, and to fix the limits of Commission authority, vested with responsibility to apply those laws, the *Stamps* report said, page 794:

> The Commission, within a few months after its organization, expressed the conclusion that the separation of white and Negro passengers paying the same fare is not in violation of section 3 of the act if cars and conditions equal in all respects are furnished to both and the same care and protection of passengers is observed. *Councill* v. *Western & A. R. Co.*, 1 I. C. C. 339; *Heard* v. *Georgia R. Co.*, 1 I. C. C. 428. It has adhered to that conclusion consistently. Although the question has been constantly and persistently agitated before the public and the Congress for many years, the Congress has done nothing to indicate that it did not concur in the Commission's interpretation of the act.

In distinguishing the Morgan case from *Mays* v. *Southern Ry. Co.*, 268 I. C. C. 352 (1947), the Commission interpreted the basis of the decision to be the burden upon interstate commerce found to result from the state statute, held to be invalid, while the *Mays* case concerned a carrier rule involving only the question of equal treatment, with reference to which the report said, page 361:

> That decision is not here in point, because circumstances relating to services afforded passengers in dining cars are substantially

different from those appertaining to transportation in motor vehicles such as those involved in the *Morgan* case. The act does not prohibit segregation of passengers based on difference in race, but it does prohibit inequality of treatment. There is, however, no justification in the instant proceeding for a finding that equality of treatment can result only from discontinuance of regulations providing for segregation in dining cars.

Considering for the moment only the question of whether or not segregation *per se* violates any provision of the Interstate Commerce Act, it seems very certain that the decision by this Court in the *Morgan* case was not intended and did not in reality change, annul, or amend principles relating to the subject, established in previous decisions. And if segregation *per se* is a violation of any Act of Congress or provision of the Constitution, it has not been so held by any court, and the *Morgan* case opinion plainly provides authority for that statement. All subordinate courts, in deciding interstate transportation cases, have so construed the *Morgan* case since that decision. And since the *Morgan* case this Court has continued to adhere, in cases involving other segregation matters, to the 75-year-old principle that segregation *per se* violates no federal law or constitutional provision.

Under the facts of this case it is not believed possible to find any substantial difference in the

treatment of colored and white passengers under current dining-car rules. The statement of facts, issues, and arguments thereon in appellant's brief, seriously suggest the conclusion that, offenses under the provisions of the Interstate Commerce Act, and equal treatment of colored and white passengers under separate service of carrier rules, is not deemed important either as a fact or legal question, but that practically the only question of importance, is to have this Court declare segregation *per se* unlawful. Here the attempt is to have that unlawfulness based upon the claimed error of the Interstate Commerce Commission in its finding that segregation is neither forbidden nor required by the Commerce Act, and as presented by appeal from the decree of a statutory court, with only limited jurisdiction, in a review of the Commission action. This appeal presents only questions within the statutory authority of the Commission to decide, which appear to require review as in all such cases, without reference to the broad general questions of legal and constitutional matters, which can only be decided by the unlimited jurisdiction of courts other than administrative agencies. The special courts, established by statute to review administrative decisions, have only the jurisdiction conferred by the creating act.

Questions of violations of the Act and equality of treatment require decisions under the facts of each case, a function exclusively for administra-

tive action, here the Commission. As long recognized by this Court, review of such fact decision is very limited, and where there is a rational basis for the administrative judgment, courts do not interfere."[19]

In here insisting that this Court decide segregation *per se* unlawful, as a violation of the Interstate Commerce Act, upon the basis of the Commission finding that it is not required or prohibited by that Act, appellant in reality seeks a decision condemning segregation as prohibited by the Constitution in all phases of human relations, not merely as to interstate commerce. It is not a question of Supreme Court jurisdiction, but one of Commission authority and jurisdiction, and that of the special statutory court upon review, not the District Court with general jurisdiction. Particularly in interstate commerce, as here the only segregation involved, it is a question of what is or is not prohibited by the Commerce Act. That as held by this Court in a number of cases, and particularly indicated in the Morgan case opinion, is a question exclusively for Congress to decide. What appellant here insists upon is, in effect, that the Interstate Commerce Act be amended by this Court, even though Congress has repeatedly refused to enact that amendment, which has often been held to be approval

[19] *Virginian Ry. Co.* v. *United States*, 272 U. S. 658; *Mississippi Valley Barge Co.* v. *United States*, 292 U. S. 282.

of segregation in interstate commerce by carrier rule.

The carrier rule here involved is believed to be entirely reasonable, to provide with certainty equal treatment for colored and white passengers, as far as that is humanly possible, within the limits of equipment available or within the reasonable capacity of the carrier to provide. Segregation *per se,* as held by the Commission, is not specifically required or prohibited by the Act, and can be found a violation only by interpretation. The Commission has not herein or elsewhere either sanctioned, approved, or disapproved segregation, as a public policy, as a human rights policy, as a legislative policy, or as any other kind of policy. It has only decided that, as required by carrier rules, it is not a violation of the existing Interstate Commerce Act, or otherwise unlawful under its interpretation of judicial decisions. There seems to be utterly no factual basis, and no recognizable statutory or judicial direction or requirement which would warrant the Commission to declare segregation *per se,* as presented herein, to be a violation of the Interstate Commerce Act or otherwise unlawful. Appellant here misconceives the authority, function and procedure of the Interstate Commerce Commission, and court review of its orders, even to a greater extent than was said in overruling the lower court in *United States* v. *Pierce Auto Lines, Inc., et al.,* 327 U. S. 515, 535–536, as follows:

> We think the court misconceived not only the effects of the Commission's action in these cases but also its own function. It is not true, as the opinion stated, that "* * * the courts must in a litigated case, be the arbiters of the paramount public interest." This is rather the business of the Commission, made such by the very terms of the statute. The function of the reviewing court is much more restricted. It is limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done. Unless in some specific respect there has been prejudicial departure from requiren ents of the law or abuse of the Commission's discretion, the reviewing court is without authority to intervene. It cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law.

II

The Constitution and separation of races in interstate transportation

The Constitution, like the Interstate Commerce Act, neither approves nor disapproves racial or any other kind of segregation, in interstate commerce or otherwise. It is important that the Constitution does not forbid segregation *per se,* as has been held by the courts for many years, and par-

ticularly by the lower court herein, first *Henderson* case opinion, page 914. Also important is the Constitutional power over interstate commerce, vested by the Commerce Clause, and recognized as exclusive legislative authority. Therefore the conclusion is compelling that, the only method and procedure by which segregation *per se* can legally be forbidden in interstate transportation, is to either amend the Constitution by specific provision, in the manner and by the procedure therein provided, or by legislative enactment specifically prohibiting it in interstate commerce. Such a constitutional amendment has never been attempted, and if sought would doubtless apply to every phase of human affairs, not merely to interstate commerce. Legislative prohibition of segregation in interstate commerce has been repeatedly urged upon Congress, numerous bills have been offered and considered, and two are now pending before the 81st Congress. For years Congress has refused to enact this legislation, and courts have construed this non-action as approval of carrier authority to require segregation under reasonable rules. In respect to other relations segregation has been considered as permitted by proper authority, where there is equality of treatment.

We may here consider as a constitutional question, only the possible legal error of the Commission in refusing to declare the carrier dining car rule to be a violation, solely upon the ground that

segregation is required. The Constitution may be lawfully amended only by the will of the people. Forbidding segregation is possible, through the will of people without amending the Constitution, either by Act of Congress, certainly as to interstate commerce and perhaps in some other relationships, or by exercise of state reserved power, which can do so with respect to all kinds of segregation, insofar as each state is concerned. The federal constitution, as to the federal government, and the several state constitutions, as to each state, are expressions of the will of the people as to basic power, constituted authority, and fundamental rights and freedoms. Under constitutions, legislative authority provides constant opportunity for expression of the will of people, as to how government may operate, and the privileges and restraints that may be applied. These are the methods by which a people under a democracy are constantly and quickly enabled to translate their customs, practices, and ambitions into the law that controls, and to change basic government only after long and careful consideration of the necessity or desirability thereof, judicial power is established to restrain legislative and administrative action to constitutional limits of authority and to protect individual rights under constitution and statute.

Within this basic framework of our democracy our people are controlled by laws, enacted by a majority expression in free elections. In this

manner the constantly changing statutory laws represent the current will of a majority of our people, and is a protection of the majority against those who would usurp power or enact laws contrary thereto. Under this governmental arrangement some courts are given jurisdiction to decide any legal controversy, some by legislative authority, while others, as here a statutory court to review administrative action, are limited to decisions upon matters vested by the creating statute. Administrative bodies are vested only with limited authority, within limits prescribed by statute.

It is the province and authority of this judicial structure of government, to each restrain itself to the exercise of power to that which has been assigned by the Constitution and legislature. This court has the ultimate judicial power to decide what is within the jurisdiction of subordinate courts, quasi-judicial administrative bodies, and even within its own constitutional power. It is a remarkable testimonial to judicial judgment, reason and devotion to fundamental principles of our government, that the balances and checks which were intended by the founding fathers to perpetuate our form of democracy, have been so carefully protected and preserved by courts possessed of such great power. This court ideal so long observed was recently and impressively restated by Mr. Justice Douglas, with respect to administrati action possibly beyond the statutory authority, in a dissent to the opinion in

Interstate Commerce Commission v. *Parker Motor Freight et al.*, 326 U. S. 60, 75, where he said:

> Whether it is wise policy for the railroads to enter and dominate this field is neither for us nor the Commission to decide. If the railroads are to be given this preferred treatment when they seek to substitute motor carrier service for rail service, the authority should come from Congress, not this Court. Meanwhile, we should be alert to see to it that administrative discretion does not become the vehicle for reshaping the laws which Congress writes.

This Court is fully aware, without citation to particular cases, of the many instances where orders of this Commission have been annulled, on the ground of exceeding its authority. The above attempt to describe the functions of government and its agencies, is intended only to emphasize the extremely narrow limits in which this Commission may act lawfully. To exceed its authority deliberately would doubtless result in judicial and legislative condemnation. The constitutional question here urged by appellant, is that the Commission erred in refusing to forbid segregation by carrier rules in interstate commerce. That is precisely the power and authority which all courts, including the supreme power of this Court, have refused to do in all the years since the emancipation of slaves. That is precisely what Congress has repeatedly refused to do, even with changes

of personnel following many elections. That is the reason no such arrogant assumption of power could be lawfully exercised by this Commission. It would be awesome and dangerous to basic processes of government were such a question to be so decided by this or any administrative agency. The recent judicial statement of Mr. Justice Douglas, above quoted, is taken as a distinct warning that this Commission must not become the vehicle for reshaping acts of Congress, and surely not to amend the Constitution, as has been repeatedly interpreted by judicial authority.

The Commission does not intend any approval or disapproval of racial segregation in transportation or elsewhere. That is appropriate for private citizens only at free elections, and to legislators in considering proposed laws. That would not be appropriate, and as here contended, lawful for this Commission, unless and until Congress amends the existing Commerce Act whereby all its authority is derived. This is not to say that the Commission is without authority to declare carrier rules and actions invalid, where constitutional rights are conceivably violated thereby. This is plainly not such a case.

It seems proper for this Commission to restrain its action to existing law, under the Constitution, as interpreted by this Court, and under statutes enacted by Congress. It is not believed appropriate to attempt unauthorized changes in the existing law, even though demanded by powerful

organizations or political expediency. We must agree with the statement of the distinguished Special Assistant Attorney General, in his argument to the lower court (R. 26), supporting the Commission action herein, where he stated: "I do not think the case should be decided upon any principles of moral philosophy or political evangelism, or upon these basic doctrines of liberty and free association and the other things which, very eloquently and very properly, my adversary has rested his case on."

With all this in mind the propriety of discussing any phase of the constitutional question urged by appellant is doubted. Only because silence may be taken as concession of the question urged by appellant, is it herein undertaken to any extent.

On that subject we can only submit the interpretations of this Court, expressed in almost innumerable opinions, and as here particularly concerned in cases above cited. It is believed that repeated opinions in cases relating to other subjects, have an important bearing upon the general question as to whether segregation *per se* violates any constitutional right. On the basis of all such opinions it is impossible to conceive a contrary decision in this case, where the limited authority of this Commission regulates interstate commerce, as directed by Congress, which holds exclusive constitutional power over the subject, as consistently held by this Court.

The abnormal, unnatural, and strained arguments of appellant make it difficult to determine the precise legal reasons or basis for the claim that segregation is a violation of some constitutional right. The effort of appellant to secure prohibition of segregation in all affairs and relationships of our people, has led to frenzied statements and claims completely foreign to usual form and substance of legal arguments. Brief subheads astound with arguments that segregation is unconstitutional because "The action of the Commission and Court is contrary to the public policy of the United States", page 74, and "Segregation on account of race is contrary to the philosophy of our government", page 78. The argument reaches into unchartered fields of government experiment and quotes from sources unrelated to judicial authority. And to support these far-fetched legal comprehensions, in the absence of record evidence, addition thereto is attempted contrary to all legal precedent, by including in the appendix, pages 94–106, inclusive, a series of letters addressed to one of counsel for appellant, commending the effort to abolish segregation, stating opinions on the subject, and in some instances relating personal experiences. In one instance the quotation is patently taken from fiction. The purpose in this part of the appendix is not understood, unless appellant and his counsel consider court proceedings the same as legislative hearings.

Legal unreality appears in such brief statements as "American people who want to practice christianity if not hampered in that practice by their government", page 90: "What we seek is not justice under law as it is. What we seek is justice to which law in its making should conform", pages 87–88; "The Emancipation Proclamation broke the legal bond of slavery but not the social one", page 83; "Negroes are American citizens; this Court should take heed what it does to them", page 76; and the following quotation from the appendix letter of the Head, Department of History, Howard University, page 96, "by training and temperament it is impossible for him (the author) to be a communist but if there were anyone thing in American society that would lead him to communism, it is the impact of the insult to his dignity as an individual arising from the dining car regulations."

These somewhat startling arguments, and statements are referred to because they evidently form the major reasons upon which appellant and his counsel base their claims of constitutional violation herein. This could not be, under any reasonable legal comprehension, an argument as to constitutionality of anything. These matters relate to human relations, customs, practices, and instincts as deep as life itself and as long standing as time. What appellant urges relates to something even deeper than law, government, and the

Constitution, as was stated by Mr. Justice Brown in *Plessy* v. *Ferguson, supra,* pages 551–552;

> The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. * * * Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.

Appellant claims that the public, other than Negroes, are interested in removing segregation. If that be so, there should be no need to seek unauthorized amendment of the Interstate Commerce Act by the Commission since Congress, elected by the public, has exclusive authority to forbid segregation in interstate commerce. Forced commingling of races against the majority will can lead only to disaster. Perhaps the warning of Mr. Justice Brown, out of the distant past, is as forceful today as when issued. Events since that time seem to prove that racial ambitions here urged can be attained only as a result of "natural affinities", a mutual appreciation of

the merit of each and voluntary consent of individuals.

Respecting purely legalistic interpretation of the Constitution, to determine its mandate, if any, upon the subject of segregation, there are numerous impressive judicial guides, clearly indicating that segregation has never been considered at any time, in any part of the country, to be forbidden by the Constitution. The authorities above cited support this statement in respect to interstate commerce. Recent decisions of this Court relating to relationships other than transportation, fully support the Commission position, that segregation *per se* is not forbidden by the Constitution. Perhaps the longest and most vigorous controversy over segregation has been in respect to schools.

The New York case of *People* v. *Gallagher,* decided in 1883, 45 Amn. R. 232, sustained segregated schools of equal quality in Brooklyn, under authority of its Board of Education, acting under state laws. The opinion includes a full discussion of prior court and statutory action upon the subject. Separation of races in Boston as early as 1849 was noted in *Roberts* v. *City of Boston,* 5 Cush. 198. Notice was taken, page 241, of establishment by Congress in 1862, of exclusive schools for the colored race in the District of Columbia. A number of cases from other states, largely states of the North, are cited as sustaining constitutionality of separation of races

in schools, page 243.[20] The reasons for segregation and the attitude of people as it then existed, could be no more clearly stated than was done by this opinion of the New York court, pages 237–238 and 240:

> In the nature of things there must be many social distinctions and privileges remaining unregulated by law and left within the control of the individual citizens, as being beyond the reach of the legislative functions of government to organize or control. The attempt to enforce social intimacy and intercourse between the races, by legal enactments, would probably tend only to embitter the prejudices, if any such there are, which exist between them, and produce an evil instead of a good result. *Roberts* v. *City of Boston*, 5 Cush. 198.
>
> A natural distinction exists between these races which was not created neither can it be abrogated by law; and legislation which recognizes this distinction and provides for the peculiar wants or conditions of the particular race can in no just sense be called a discrimination against such race or an abridgment of its civil rights. * * * Recent movements on the part of the colored people of the south, through their most intelligent leaders, to secure Federal sanction to the separation of the two races,

[20] *State, ex rel. Garnes* v. *McCann*, 21 Ohio St. 210; *Cory* v. *Carter*, 48 Ind. 327; *Ward* v. *Flood*, 48 Cal. 36; *State* v. *Duffy*, 7 Nev. 342.

so far as the same is compatible with their joint occupation of the same geographical territory, afford strong evidence of the wishes and opinions of that people as to the methods which in their judgments will conduce most beneficially to their welfare and improvement.

In *Cumming* v. *Richmond County Board of Education,* 175 U. S. 528, (1899) the opinion by Mr. Justice Harlan, who dissented in the *Plessy* case, held that race segregation in public schools under state statute was not prohibited by the Fourteenth Amendment. *Gong Lum* v. *Rice,* 275 U. S. 78 (1927), sustained as lawful refusal to admit a Chinese to white public school, under state statute requiring separate schools for white and colored students. Speaking of the state court decision holding the state statute lawful, the opinion of Mr. Chief Justice Taft said, page 87, "The decision is within the discretion of the state in regulating its public schools and does not conflict with the Fourteenth Amendment." State courts have held that separation of races in public schools is not forbidden by the Constitution.[21]

A leading recent school segregation case decided by this Court is *Missouri Ex Rel. Gaines* v. *Canada,* 305 U. S. 337 (1938). The question there arose over refusal of Missouri University to

[21] *People* v. *School Board of Borough of Queens,* 161 N. Y. 598, 56 N. E. 81 (1900); *State ex rel. Weaver* v. *Board of Trustees of Ohio State U.,* 126 Ohio St. 290, 185 N. E. 196 (1933).

admit Gaines, a Negro, to its law school, and mandamus was sought to compel the University to admit him. Denial of admission to the University was held a violation of rights to equal school opportunity where no separate school was available for Negroes. The opinion by Mr. Chief Justice Hughes notes recognition by state court of the obligation to provide educational opportunity for Negroes substantially equal to those provided whites, stating, page 344, "The State has sought to fulfill that obligation by furnishing equal facilities in separate schools, a method the validity of which has been sustained by our decisions." And to make it clear that segregation itself is not unlawful the opinion later said, page 349, "The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State."

The *Gaines* case is important in plainly stating the position of this Court, adhered to over many years, to the effect that separation of races in various activities is lawful and does not violate constitutional rights, provided equality of treatment is afforded both races. *Sipuel* v. *Board of Regents,* 332 U. S. 631 (1948), was decided per curiam upon authority of the *Gaines* case.

Other cases in numbers too great to permit mention or discussion deal with segregation in many affairs of life, which have little or no appli-

cation here. The District Court opinion below considered and interpreted all decisions of this Court, since the prior District Court case herein, which were deemed to be pertinent. The *Morgan* case was distinguished from the instant case, as shown above. The *Bob-Lo Excursion Co.* v. *Michigan* case, 333 U. S. 28, was interpreted as only upholding a Michigan statute prohibiting segregation in local transportation, and not pertinent herein, pages 38–39. The deed covenant cases[22] involving prohibited sales of realty to Negroes was held to "have no relation, directly or indirectly, to issues of the present case. Those cases do not hold that race segregation in respect to deed covenants is forbidden."

The one outstanding constitutional fact established under the above-cited authorities is that segregation is not forbidden. It is always inequality of treatment which leads to invalidation of state statute, carrier rule, and other authority requiring separation of races. Despite repeated adherence to this principle over many years, appellant here again asks this Court to apply a different interpretation to the Constitution, and decide this case completely contrary to all prior decisions. To do that herein would be to set aside the power of Congress, previously considered exclusive, and to require Commission action con-

[22] *Shelley et ux* v. *Kraemer et ux*, and *McGhee et ux* v. *Sipes et al.*, 334 U. S. 1; *Hurd et ux* v. *Hodge et al.*, and *Urciola et al.* v. *Hodge et al.*, 334 U. S. 24.

trary to the will of Congress. It is not believed appropriate or within Commission authority for it to make such a decision, except upon the direction of Congress, or mandate of this Court. Up to the present Congress has not issued any such direction, and this Court appears to have no legal or factual basis in this appeal, upon which to issue such a mandate.

CONCLUSION

For the reasons stated, the decree of the District Court should be affirmed.

DANIEL W. KNOWLTON,
Chief Counsel.

ALLEN CRENSHAW,
Assistant Chief Counsel.

APPENDIX

INTERSTATE COMMERCE ACT, 49 U. S. C.

NATIONAL TRANSPORTATION POLICY

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

SEC. 1 (4). It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request

therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to Chapter 12 of this title, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

SEC. 3 (1). It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall

not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

SEC. 15 (1). Whenever, after full hearing, upon a complaint made as provided in section 13 of this chapter, or after full hearing under an order for investigation and hearing made by the commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in the first section of this chapter, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation

other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation of practice so prescribed.

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